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In The

Supreme Court of the United States

October Term, 1994

JOHN L. HOLAHAN, JR., in his official capacity as Chair of the Minnesota Ethical Practices Board; HUBERT H. HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,

Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA; *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does a state campaign financing statute which does not restrict independent expenditures or dictate the content of messages financed through such expenditures violate the First Amendment because it provides a public benefit to a political candidate in response to independent expenditures in opposition to the candidate?

LIST OF PARTIES

The Petitioners in this action are John L. Holahan, Jr., Chair of the Minnesota Ethical Practices Board, and Hubert H. Humphrey III, Attorney General of the State of Minnesota.

The Respondents include: 1) the Appellants in Case No. 94-2387 below: Scott Day, Treasurer of IMPACE-MEA; IMPACE-MEA, a political fund; Steve Frazier, a Minnesota taxpayer and contributor to IMPACE-MEA; Richard Kimbler, a taxpayer and an Independent-Republican candidate for Secretary of State; and 2) the Appellants in Case Nos. 94-2388 and 94-2390: Minnesota Citizens Concerned for Life, Inc., a non-profit corporation organized under Minnesota law; Jacqueline A. Schwietz, Treasurer of the registered political fund Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates; Mitchell Hoyt Unruh, a candidate in 1994 for the Minnesota House of Representatives; and Lori Erickson, who ran for a seat in the Minnesota Senate in 1990 and intends to run again in 1996.

The parties to the proceedings in the court of appeals included all of the Respondents listed above and, in addition, Eileen Angell, Cross-Appellee in Case No. 94-2585. Because Eileen Angell did not file an appeal in the court of appeals with respect to the issue set forth in the Question Presented for Review in this petition, and because Petitioners do not seek review of the court of appeals' judgment in Case No. 94-2585 (concerning the constitutionality of the contribution limitations of Minn. Stat. § 10A.27, subd. 12 (Supp. 1993)), Petitioners believe

LIST OF PARTIES – Continued

that Eileen Angell has no interest in the outcome of this petition and have advised the Clerk of Court accordingly pursuant to Sup. Ct. R. 12.4.

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JOHN L. HOLAHAN, JR., in his official capacity as Chair of the Minnesota Ethical Practices Board; HUBERT H. HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on September 1, 1994.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), and is reproduced in the Appendix ("App.") at A1 to A24. The district

court's opinion is not reported and is reproduced in the Appendix at A25 to A66.

JURISDICTION

On September 1, 1994, the court of appeals entered its judgment in this case. A3. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1988).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

Minn. Stat. § 10A.01, subd. 10b (Supp. 1993):

> "Independent expenditure" means an expenditure expressly advocating the election or defeat of a clearly identified candidate, which expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate. An expenditure by a political party or political party unit, as defined in section 10A.275, subdivision 3, in a race where the

political party has a candidate on the ballot is not an independent expenditure.

Minn. Stat. § 10A.20, subd. 6b(a) (Supp. 1993):

> Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of $100, other than an expenditure by an association targeted to inform solely its own dues-paying members of the association's position on a candidate, the individual, political committee, or political fund shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy on the treasurer of the candidate's principal campaign committee. The affidavit must contain the information with respect to the expenditure that is required to be reported under subdivision 3, paragraph (g); except that if an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.

Minn. Stat. § 10A.25, subd. 13 (Supp. 1993):

> (a) The expenditure limits in this section are increased by the sum of independent expenditures made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents, other than expenditures by an association targeted to inform solely its own dues-paying members of the association's position on a candidate.
>
> (b) Within 48 hours after receipt of an expenditure report or notice required by section 10A.20, subd. 3, 6, or 6b, the board shall notify

each candidate in the race of the increase in the expenditure limit for the candidates against whom the independent expenditures have been made.

(c) Within three days after providing this notice, the board shall pay each candidate against whom the independent expenditures have been made, if the candidate is eligible to receive a public subsidy and has raised twice the minimum match required, an additional public subsidy equal to one-half the independent expenditures. The amount needed to pay the additional public subsidy under this subdivision is appropriated from the general fund to the board.

STATEMENT OF THE CASE

This case involves a First Amendment challenge to a Minnesota campaign financing statute relating to independent expenditures. As described further below, the statute at issue increases the spending limits of, and provides a public subsidy to, candidates against whom such independent expenditures are made. Also at issue in this case is the constitutionality of another state statutory provision dealing with the reporting of independent expenditures. Following is a summary of the background to this legislation and a description of the operation of these statutes.

I. BACKGROUND.

Responding to concerns about the public's confidence in the political process and about the potential for

corruption of the political process through undue influence by large financial contributors, the 1993 Minnesota Legislature adopted the Act of May 20, 1993, ch. 318, 1993 Minn. Laws 1882 ("Chapter 318"). Chapter 318 extensively amended Minnesota's laws relating to political campaigns and campaign financing, including Minn. Stat. ch. 10A, the Minnesota Ethics in Government Act.[1] The legislation was adopted after consideration of recommendations of a task force that was made up of a broad-based group of people including both Democrats and Republicans. App. at A100-01. The task force included legislators, representatives of the Ethical Practices Board, lobbyists, and representatives from the League of Women Voters, the Joint Religious Legislative Coalition, the Citizens League, Common Cause, and other groups. *Id.* at A106-07.

The overall goal of the task force was to formulate recommendations that would "enhance the public's confidence in the political process and in public officials" and to "encourage a broader public participation in the electoral process." *Id.* at A103 and A108. The task force members noted that perceptions of fairness and propriety had a direct link to voter confidence in the system and hoped by their proposals to remove barriers to candidacy by qualified challengers; to simplify the system of running for office; to bring about a more open, accountable, and responsive political process; and to increase the substantive quality of the elections. *Id.* at A103-104 and A108. They also hoped to decrease the influence of money while increasing the influence of merit in campaigns. *Id.* Among

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[1] Pursuant to Minn. Stat. § 10A.02 (1992), the Minnesota Ethical Practices Board (the "Board") is charged with administering, interpreting, and enforcing Chapter 10A.

the task force members' concerns were the decreases in direct participation in politics, caucus attendance, the number of people checking off for Minnesota's public campaign financing check-off system, and direct giving to campaigns. Instead, the task force found that more and more people were giving money to political committees to express their political views. App. at A110-11.

One of the important goals of Chapter 318 was to limit the potential for corruption or the appearance of corruption resulting from contributions to campaigns. For example, the legislation made dramatic reductions in the contribution limits applicable to candidates for statewide and legislative offices, in many cases reducing the limits by 90 percent.[2] The legislation also limits the total amount that candidates can accept from certain sources, specifically political committees, political funds, lobbyists, and certain individuals. Minn. Stat. § 10A.27, subd. 11 (Supp. 1993) (limits the aggregate contribution from those sources to twenty percent of the expenditure limits for the office sought by the candidate).

Chapter 318 also includes several incentives for candidates to participate in Minnesota's public subsidy/voluntary spending limit statutory scheme which is further described in the following section.[3] Among these incentives are the

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[2] This Court has upheld limits on contributions to candidates against a First Amendment challenge. *Buckley v. Valeo*, 424 U.S. 1, 28-29 (1976) (per curiam).

[3] This Court in *Buckley* held that mandatory limits on candidate campaign expenditures violated the First Amendment but distinguished expenditure limits that were part of the public financing scheme for presidential elections, stating: "Congress may engage in public financing of election campaigns and may

provisions relating to independent expenditures, Minn. Stat. §§ 10A.20, subd. 6b and 10A.25, subd. 13 (Supp. 1993), which are at issue in this petition. Respondents challenged the constitutionality of these independent expenditure provisions. The discussion below describes these independent expenditure provisions and the rulings of the lower courts in this case.

II. THE STATUTES AT ISSUE.

Because the independent expenditure provisions of Minn. Stat. §§ 10A.20, subd. 6b and 10A.25, subd. 13 (Supp. 1993) are closely related to the public subsidy/voluntary spending limit provisions of Chapter 10A, it is helpful to review Minnesota's public subsidy/voluntary spending limit statutory scheme in order to understand the independent expenditure provisions themselves. The following discussion describes: 1) the statutory scheme; and 2) the independent expenditure provisions and the role they play within that scheme.

A. The Public Subsidy/Voluntary Spending Limit Statutory Scheme.

Minnesota has established a system under which candidates may receive public money to conduct their

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condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." *Id.* 424 U.S. at 57 n.65. Thus, the Court approved using the incentive of public financing as an inducement to the acceptance of spending limits that could not be directly imposed. *See also Republican National Committee v. Federal Election Commission*, 445 U.S. 955 (1980), *aff'g mem.*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court).

campaigns in exchange for the candidates' agreement to be bound by campaign expenditure limits.[4] This statutory scheme benefits the public because it reduces the candidates' need to solicit contributions and reduces the potential for corruption or the appearance of corruption that can result from large contributions. Reducing the need to solicit funds promotes First Amendment values because it gives candidates more time to meet voters and publicly debate the issues. *See Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (per curiam); *Vote Choice v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993).

In order to receive a public subsidy, a candidate must sign and file with the Board a written agreement in which the candidate agrees to be bound by the campaign expenditure limits of Minn. Stat. § 10A.25, subd. 2 (Supp. 1993). The expenditure limits only apply to the candidate, however, if the candidate's major party opponent has also agreed to be bound by the expenditure limits. Minn. Stat. § 10A.25, subd. 10(b) (Supp. 1993). As an additional incentive to candidates to accept the expenditure limits, the 1993 Legislature added a provision which gives to the agreeing candidate (or candidates, in equal shares) a portion of the subsidy of the opponent who does not agree to the limits. Minn. Stat. § 10A.25, subd. 10(b) (Supp. 1993).

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[4] Minnesota first enacted legislation providing public subsidies for state election campaigns in 1974. Act of April 12, 1974, ch. 470, §§ 30-32, 1974 Minn. Laws 1172-74. That law also imposed expenditure limits. *Id.* at § 25, 1974 Minn. Laws 1169-70. In 1976, the legislature amended the law to couple public funding with an agreement to adhere to the spending limits. Act of April 13, 1976, ch. 307, § 34, 1976 Minn. Laws 1163-64.

Further, under the statutory scheme, no candidate is eligible to receive a public subsidy unless the candidate has accumulated enough contributions from eligible voters to meet the matching requirements of Minn. Stat. § 10A.323 (Supp. 1993).[5]

The amount of the public subsidy available is determined in accordance with a statutory formula for each office. Minn. Stat. § 10A.31, subd. 5 (1992). The amount for which each candidate is eligible depends on the county in which he or she is running and the number of votes received as a percentage of the total votes for the candidates of that party in the last general election. The

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[5] Additional eligibility requirements for receipt of a public subsidy are contained in Minn. Stat. § 10A.31 (1992 and Supp. 1993). A candidate who is unopposed in both the primary election and the general election is not eligible to receive a public subsidy. Minn. Stat. § 10A.31, subd. 12 (Supp. 1993). Candidates who win the primary election and whose names will appear on the ballot in the general election receive a public subsidy from the applicable "political party account" in the State Elections Campaign Fund, but candidates who lose the primary receive nothing from the fund. Minn. Stat. § 10A.31, subd. 6 (Supp. 1993). Thus, winning the primary is another eligibility requirement for receiving a public subsidy. The funds are distributed *after* the results of the primary election are determined. *Id.* Additional public subsidies are paid to candidates from the "general account." Funds in the general account are paid to candidates for statewide office who received at least five percent of the votes cast in the general election for that office, and to candidates for legislative office who received at least ten percent of the votes cast in the general election for the specific office for which they were candidates. Minn. Stat. § 10A.31, subd. 7 (Supp. 1993). Thus, in order to receive a public subsidy from the general account in the State Elections Campaign Fund, a candidate must receive enough votes in the general election.

total subsidy received by a candidate may not exceed 50 percent of the expenditure limit applicable to that candidate. Minn. Stat. § 10A.31, subd. 7 (Supp. 1993).

B. The Independent Expenditure Provisions.

Under the provisions added by Chapter 318, the making of an independent expenditure triggers certain requirements. An independent expenditure is defined as "an expenditure expressly advocating the election or defeat of a clearly identified candidate" but one made neither with consent or authorization of the candidate nor at the request or suggestion of the candidate. Minn. Stat. § 10A.01, subd. 10b (Supp. 1993). The first requirement triggered by the making of an independent expenditure is a reporting requirement, as follows:

> Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of $100, other than an expenditure by an association targeted to inform solely its own dues-paying members of the association's position on a candidate, the individual, political committee, or political fund shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy on the treasurer of the candidate's principal campaign committee. The affidavit must contain the information with respect to the expenditure that is required to be reported under subdivision 3, paragraph (g); except that if an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.

Minn. Stat. § 10A.20, subd. 6b(a) (Supp. 1993). The making of an independent expenditure also triggers the requirements of Minn. Stat. § 10A.25, subd. 13 (Supp. 1993), which provides:

> (a) The expenditure limits in this section are increased by the sum of independent expenditures made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents, other than expenditures by an association targeted to inform solely its own dues-paying members of the association's position on a candidate.
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> (b) Within 48 hours after receipt of an expenditure report or notice required by section 10A.20, subd. 3, 6, or 6b, the board shall notify each candidate in the race of the increase in the expenditure limit for the candidates against whom the independent expenditures have been made.
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> (c) Within three days after providing this notice, the board shall pay each candidate against whom the independent expenditures have been made, if the candidate is eligible to receive a public subsidy and has raised twice the minimum match required, an additional public subsidy equal to one-half the independent expenditures. The amount needed to pay the additional public subsidy under this subdivision is appropriated from the general fund to the board.

On its face, the public subsidy provision of subdivision 13(c) applies only if the opposed candidate is bound by the spending limits, is eligible to receive a public subsidy, and has raised twice the minimum match required by Minn. Stat. § 10A.323 (Supp. 1993). As discussed above, under Minn.

Stat. § 10A.31, subd. 6 (Supp. 1993), a candidate is eligible to receive the first available public subsidy if the candidate has won the primary election.[6]

The need for these new provisions addressing independent expenditures arose from the risk that independent expenditures pose to the viability of the State's statutory scheme relating to public subsidies and voluntary spending limits. A candidate who must decide whether to accept the campaign expenditure limitations must also take into account the fact that people and associations who oppose the candidate are free to make independent expenditures. The amount of these independent expenditures is not limited by law, since under this Court's decision in *Buckley*, independent expenditures cannot be limited without offending the First Amendment. 424 U.S. at 51. These independent expenditures can

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[6] Contrary to the Eighth Circuit's apparent belief, App. at A7-8 n.2, Minn. Stat. § 10A.25, subd. 13(c) (Supp. 1993) has no application to independent expenditures made in connection with a primary election but applies during the general election once candidates first become eligible for a public subsidy. The provision in subdivision 13(a), providing for an increase in spending limits, does, however, apply during the primary since that provision lacks the "eligibility" language of subdivision 13(c). The Eighth Circuit also questioned whether the public subsidy provision of the independent expenditure law is contrary to the other terms of Minnesota's campaign financing laws including, in particular, the requirement that no additional public subsidy be paid from the general account until *after* the election is over. App. at A8 n.2. The Board has, however, interpreted section 10A.25, subd. 13(c) to allow for payment of public subsidies after the primary election. Because the subsidies paid as a result of independent expenditures are paid out of a separate appropriation from the State's general fund, there is no irreconcilable conflict in the statutory scheme.

finance massive negative publicity campaigns against a candidate, without prior notice and very close to the date of the election, at a time when a candidate is already at or near the spending limits and/or out of money, thus leaving the targeted candidate unable to respond. The potential for such tactics may discourage candidates from accepting the voluntary limits because they may find themselves unable to counter such negative campaigning.

The independent expenditure provisions of Chapter 318 are also necessary because other provisions of Chapter 318 have greatly increased the likely role of independent expenditures in Minnesota elections. Prior to the enactment of Chapter 318, independent expenditures had not been a large factor in Minnesota elections. In the 1992 elections, total independent expenditures in Minnesota amounted to approximately $332,000, as compared to candidate spending of over $9 million. In 1993, Chapter 318 dramatically reduced contribution limits applicable to candidates and put restrictions on how much candidates may accept from certain sources. One of the foreseeable consequences of these new limits and restrictions is a "surplus" of money in the hands of individuals and groups who formerly gave very large donations to candidates, but who are now limited to much smaller contributions. This extra money is now available to be spent in other ways to influence the outcome of elections including, in particular, the making of independent expenditures. Thus, the inherent risk that adverse independent expenditures pose to a candidate who agrees to the statutory spending limits is now magnified because of the likelihood of increased independent expenditures and the potential that independent expenditures will play a much

more important role in influencing the outcome of elections in Minnesota. To preserve the viability of the voluntary spending limit program, it was necessary to counterbalance this risk.

Because independent expenditures may not constitutionally be limited, the Minnesota Legislature was required to address the problems that independent expenditures pose without imposing any limits on these expenditures. The legislature accomplished this goal by adopting Minn. Stat. §§ 10A.20, subd. 6b and 10A.25, subd. 13 (Supp. 1993). As discussed below, these laws in no way restrict the making of, or dictate the content of messages financed through, independent expenditures. Rather, they merely increase the spending restrictions of opposed candidates and give the opposed candidates some additional public subsidy to eliminate, or at least reduce, the risk that adverse independent expenditures pose to the voluntary spending limit program.

III. THE LOWER COURTS' RULINGS.

In the district court, Respondents moved for a preliminary injunction to enjoin the State from implementing or enforcing the independent expenditure provisions. The district court denied the motion in a Memorandum and Order filed on January 5, 1994. App. at A69 to A97. Respondents then moved for summary judgment on their claims. By judgment entered May 27, 1994, the district court upheld the independent expenditure provisions of Minn. Stat. ch. 10A. App. at A25 to A66. The district court reasoned that these provisions are content neutral in that the increase in spending limits and the public subsidy are triggered by the fact of an independent expenditure and

not the content of the speaker's message. *Id.* at A37. The court also noted that the law does not force those making such expenditures to use their own private resources to facilitate the speech of those they oppose. *Id.* In addition, the court observed that the statute does not in any way limit independent expenditures by restricting who can make them, how many can be made, or what message they can communicate. Accordingly, the court concluded that the independent expenditure provisions do not impose a significant restriction on free speech. *Id.*

The district court also rejected Respondents' contention that the independent expenditure provisions constitute an improper use of public funds. Citing prior decisions of this Court, *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) and *Rust v. Sullivan*, ___ U.S. ___, 111 S. Ct. 1759 (1991), the district court stated that the government is not obligated to subsidize all speech equally and that a content-neutral subsidy, like the statute in this case confers, does not violate the rights of those who do not receive the subsidy. App. at A38.

Finally, the district court concluded that the fact that the statute may require someone to make a strategic decision whether to make an independent expenditure does not make out a free speech violation. *Id.* at A38-39. Moreover, the court found that the statute actually advances First Amendment core values by facilitating even more speech insofar as the statute provides for enhanced debate on issues of public concern raised by independent expenditures. *Id.* at A39.[7]

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[7] The district court also rejected Respondents' vagueness and overbreadth challenges to the independent expenditure

Respondents filed an appeal to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed the district court's decision regarding the independent expenditure provisions and remanded the case to the district court for the entry of judgment and appropriate permanent injunctions against enforcement of the statutes. *Id.* at A14. With respect to Minn. Stat. § 10A.25, subd. 13 (Supp. 1993), the court of appeals stated that "[t]o the extent that a candidate's campaign is enhanced by the operation of the statute, the political speech of the individual or group that made the independent expenditure [opposing the benefited candidate] is impaired." *Id.* at A8. The court concluded that the statute has a "chilling effect" on the free exercise of protected speech because it induces "self-censorship" by persons who wish to make independent expenditures but do not wish to confer benefits on the candidates they oppose.[8] *Id.* at A9-10. Finding no compelling state interest for the law, the court struck section 10A.25, subd. 13 down as violative of the First Amendment. *Id.* at A11-14. Finally, the court held that Minn. Stat. § 10A.20, subd. 6b (Supp. 1993) is not severable from section 10A.25, subd. 13 and, therefore, must also fall. *Id.* at A15.

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reporting requirements in section 10A.20, subd. 6b (Supp. 1993). *Id.* at A40-48.

[8] In a footnote, the court also stated: "To the extent the statute encroaches upon the ability of 'like-minded persons to pool their resources in furtherance of political goals,' it also implicates 'protected associational freedoms.' " *Id.* at A9 n.3. The court did not hold, however, that the statute encroached upon the ability of persons to pool their resources to further political goals, and so this language is dicta.

REASONS FOR GRANTING THE PETITION

The Court should review this case because the decision of the court of appeals conflicts with First Amendment principles articulated in prior decisions of this Court and other circuit courts of appeals concerning the issue of whether laws that confer benefits on one person violate another person's free speech rights. Plenary review is warranted because this case presents an important issue of constitutional law that has potential nationwide ramifications.

I. THE DECISION OF THE COURT OF APPEALS THAT MINNESOTA'S INDEPENDENT EXPENDITURE PROVISIONS VIOLATE THE FIRST AMENDMENT BY CONFERRING A BENEFIT UPON OPPOSED CANDIDATES CONFLICTS IN PRINCIPLE WITH PRIOR FIRST AMENDMENT DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

As the district court correctly concluded, Minnesota's independent expenditure provisions do not violate the First Amendment in that they do not restrict anyone from making independent expenditures or in any way dictate the content of the messages communicated by those making such expenditures. Nor do they force individuals or associations to fund the expression of viewpoints they oppose. *Brookins v. O'Bannon*, 699 F.2d 648, 656 (3d Cir. 1983) ("Absent the imposition of a constitutional burden, there can be no constitutional penalty."). Nevertheless, the Eighth Circuit concluded that Minnesota's independent expenditure provisions chill the exercise of free speech simply by conferring benefits on candidates

opposed by those wishing to make such expenditures. As argued below, this Court has never recognized, and other federal courts have rejected, the principle that a statute violates the First Amendment merely by conferring a benefit on another in response to someone's protected speech.

This Court and several circuit courts have refused to find a constitutionally impermissible burden on free speech where the government subsidizes speech or otherwise provides a benefit to some persons engaged in political speech without providing the same benefit to others. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court upheld a statute which provided federal funds for presidential candidates who entered primary campaigns, but did not provide funds for candidates who did not run in party primaries. The Court rejected a First Amendment challenge to this provision because the statute did not restrict speech. *Id.* at 85-109. The Court stated that the statute was "a congressional effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93.

Moreover, in *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), the Court upheld two aspects of the "fairness doctrine" which requires a broadcaster to provide the opportunity to reply to personal attacks in the context of controversial public issues and to political editorializing. The Court found the doctrine to be "not inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs" even though the doctrine essentially compels a broadcaster to give a benefit –

namely, broadcast time – in response to another's exercise of protected speech. *Id.* at 392.[9]

Furthermore, in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), this Court upheld the denial of tax-exempt status to a non-profit corporation because it engaged in lobbying. Stating that a tax exemption is a form of subsidy, the Court noted that Congress had enacted a system providing a subsidy to non-profit civic welfare organizations generally and an additional subsidy to those that did not engage in substantial lobbying. The Court rejected TWR's First Amendment challenge, stating: "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying." *Id.* at 546. The Court further stated that:

> Where governmental subsidies are not " 'aimed at the suppression of dangerous ideas,' " its "power to encourage actions deemed to be in the public interest is necessarily far broader."

Id. at 550 (citations omitted).[10]

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[9] In *Buckley*, the Court rejected the fairness doctrine as a rationale for justifying *restrictions* on independent expenditures. 424 U.S. at 49 n.55. This case, however, does not involve a law which imposes restrictions on independent expenditures.

[10] The district court also cited this Court's decision in *Rust v. Sullivan*, ___ U.S. ___, 111 S. Ct. 1759 (1991). In *Rust*, the Court upheld, against a First Amendment challenge, government regulations prohibiting recipients of federal family planning funds from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. The Court stated: "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time

Several circuit courts of appeals have also rejected the notion that the mere granting of a benefit to someone violates another's free speech rights. In *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993), the First Circuit concluded that the Rhode Island program for public financing of the gubernatorial campaign, which provides incentives for candidates to accept public campaign funds (and accompanying overall spending limitations), "furthers, rather than smothers, first amendment values." *Id.* at 39. Under the state statutory scheme, candidates who agreed to accept public funding could accept contributions of up to $2,000 annually from any person or political action committee. This was double the usual contribution limit of $1,000 which applies to contributions to privately-funded candidates, creating what the court referred to as a "contribution cap gap." Plaintiffs in *Vote Choice* contended that the contribution cap gap violated a privately-funded candidate's First Amendment rights because the cap gap was not an incentive to accept public financing, but rather a penalty that was impermissible. The First Circuit disagreed and concluded that the contribution cap gap "neither penalizes certain classes of office-seekers nor coerces candidates into surrendering their First Amendment rights." *Id.* at 39.

The facts in this case are also similar to those in *Brookins v. O'Bannon*, 699 F.2d 648 (3d Cir. 1983), in which

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funding an alternate program which seeks to deal with the problem another way." *Id.* at 1772. *See also Planned Parenthood v. Agency for Int'l Dev.*, 915 F.2d 59, 63 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2257 (1991) (government decision not to subsidize exercise of fundamental right not subject to strict scrutiny because it places no government obstacle in the path of a person seeking to exercise the right).

the Third Circuit held that a statute which forced an association to make an unpleasant choice as to its priorities did not violate the plaintiffs' First Amendment rights. In *Brookins*, two statutes were enacted, one raising welfare benefit levels for one class of needy persons and the other lowering them for another class of needy persons. A non-severability clause made the two statutes inseparable – a successful challenge to one statute would result in the striking down of both. An organization that represented the interests of all needy persons claimed that the non-severability clause burdened its freedom to associate because a lawsuit challenging one of the statutes would inevitably be against the interest of a portion of its membership, leaving the association with a difficult choice. The court rejected the argument that the non-severability clause burdened the plaintiffs' associational rights or their right of access to the courts. Finding no burden on plaintiffs' rights, the court upheld the statute. *Id.* at 656.

These decisions support Petitioners' argument that a statute does no violence to the First Amendment merely because it confers a benefit on someone because of another's exercise of protected speech rights. That is precisely what Minnesota's independent expenditure provisions do. They do not prevent anyone from making an independent expenditure or regulate in any way the content of the message communicated through the expenditure. Rather, the statute only raises the spending limits of, and provides a public subsidy to, the candidates against whom such independent expenditures are made.[11] Someone wishing to make an independent expenditure opposing a particular candidate will

[11] While the court of appeals failed to note this distinction, the increase in an opposed candidate's spending limit is not a benefit to a candidate, like a subsidy. It is, rather, merely the

admittedly have to choose whether to make the expenditure and thereby trigger the benefit discussed above, or not make the expenditure at all. There is simply no constitutionally impermissible chilling effect in having to make such a choice as made clear in the above-discussed cases.

Not only did the Eighth Circuit fail to discuss or distinguish the above-cited cases, but it relied upon a decision of this Court that does not support its decision in this case. The court of appeals cited *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1958), in support of its conclusion that the "self-censorship" effect of the independent expenditure provisions is just as much an impermissible burden on free speech as direct government censorship. App. at A10. At issue in *City of Lakewood* was a city ordinance that gave the mayor total authority to grant or deny applications for newsrack permits. The Court found that the mayor's unbridled discretion to deny such permits could result in self-censorship insofar as a newspaper could be influenced in what it printed by its desire to obtain permits for its newsracks. *Id.* at 757-58.

The independent expenditure provisions are not even remotely analogous to the ordinance in *City of Lakewood*. While the newspaper in that case was legitimately concerned that it would be denied permits if it published any

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removal of a potential impediment to the candidate's response that would not exist but for the candidate's voluntary acceptance of the spending limits in order to participate in the public campaign funding. A state could certainly provide a subsidy to a candidate without any spending cap. It should, therefore, also be able to partially increase a limit to provide a candidate a fair opportunity to reply to an independent expenditure in order to promote a voluntary spending limit program.

stories critical of the mayor, there is no similar risk of self-censorship in this case. In *City of Lakewood*, the newspaper feared it would be punished or penalized for its expression of protected speech. In this case, on the other hand, Respondents' only argument, and the one upon which the court of appeals relied, is that others who they oppose will be benefited if they exercise their free speech rights. As discussed above, this Court has not found, and should not find, that the government violates someone's free speech rights by assisting another in responding to that speech. That is scarcely the kind of self-censorship this Court was concerned with in *City of Lakewood*.[12]

The independent expenditure provisions at issue in this case are also much different than the types of laws which have been held by this Court to penalize the exercise of freedom of speech. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Pacific Gas & Electric v. Public Utilities Commission of California*, 475 U.S. 1 (1986) ("*PG&E*"). In *Miami Herald*, the statute provided that if a candidate was assailed by any newspaper regarding his personal character or official record, the candidate had the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate might make to the newspaper's charges. 418 U.S. at 256, 258. In *PG&E*, a utility was ordered to place in its billing envelopes the newsletter of a group called Toward Utility Rate Normalization ("TURN"). In both those cases, the plaintiffs were required to use their own communication resources to

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[12] In fact, as the district court correctly observed in this case, the independent expenditure provisions actually facilitate more speech insofar as they increase debate about issues of public concern raised by the expenditures. App. at A39.

disseminate someone else's message. That is not the case here. In addition, in *PG&E*, the message which the utility was forced to disseminate was a message potentially hostile to the utility itself. The Court stated:

> The Commission's order forces appellant to disseminate TURN's speech in envelopes that appellant owns and that bear appellant's return address. Such forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent.

Id. at 18. In each case, the statute "forced the speaker's opponent – not the taxpaying public – to assist in disseminating the speaker's message." *Id.* at 16. The statute at issue here imposes no such penalty. Moreover, to the extent the statute can be said to facilitate the dissemination of the speaker's – the opposed candidate's – message in response to an independent expenditure, it does so through the use of *public* funds and not the funds of those like Respondents in this case.

The fundamental flaw in the court of appeals' decision is its conclusion that a state cannot confer a benefit on someone in response to another's protected speech. This basic principle is in conflict with decisions of this Court and several circuit courts. Respondents would like the law to be that if they engage in protected speech, the government cannot do anything that might help another to respond to that speech. In other words, Respondents claim not only to have a constitutional right to engage in protected speech, but also to have a further constitutional right to prevent the government from facilitating a fair opportunity to respond by candidates who have agreed

to participate in the state's voluntary spending limit/public subsidy system. Suffice it to say, the First Amendment has never been extended that far and this Court should review this case and say so directly.

Even if Minnesota's independent expenditure provisions could be construed as a burden on free speech, they must be upheld because they are "narrowly tailored to serve a compelling governmental interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665 (1990).[13]

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[13] The court of appeals decided that the independent expenditure provisions should be subject to this highest level of scrutiny because it found the statute to be content-based insofar as an independent expenditure triggers the subsidy and limit-increasing provisions only to the extent that it favors or opposes a particular candidate. App. at A10-11. This Court recently stated that the principle inquiry in determining content neutrality is "whether the government has adopted a regulation of speech because of [agreement] or disagreement with the message it conveys." *Turner Broadcasting System v. FCC*, ___ U.S. ___, 114 S. Ct. 2445, 2459 (1994). In adopting the independent expenditure provisions, the State has not expressed any favoritism toward or disagreement with any messages that might be conveyed through such expenditures. To the contrary, the law is utterly indifferent to the content of the messages and, in fact, applies equally to independent expenditures communicating diametrically opposite viewpoints concerning exactly the same issue. At worst then, if the independent expenditure provisions restrict speech at all, they do so based on the subject matter rather than the viewpoint of the speech. As such, they should be subject to a lesser level of scrutiny than viewpoint-based restrictions. *See R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S. Ct. 2538, 2569 (1992) (Stevens, J., concurring) ("[I]n general, viewpoint-based restrictions on expression require greater scrutiny than subject-matter based restrictions."). Even if the independent expenditure provisions are subjected to the highest level of scrutiny as applied in *Austin*, however, they are nevertheless constitutional for the reasons discussed herein.

As a whole, the provisions of Minn. Stat. ch. 10A and Chapter 318 are designed to enhance the public's confidence in the political process by encouraging candidates to accept campaign expenditure limitations and by regulating the flow of money directly into campaigns to reduce the influence of wealthy special interest groups. With the severe restrictions imposed by Chapter 318 on contributions to candidates, the legislature felt the need to address independent expenditures, which do not directly flow into campaigns but which nevertheless play a role in influencing the outcome of elections. This role is expected to be even larger than it was in the past because money which was likely in the past to be spent on contributions to candidates is now more likely to be spent instead on independent expenditures.

The legislature has tried to encourage candidates to voluntarily adopt spending limits and accept public subsidies. Candidates facing the potential for unlimited independent expenditures being made against them might reject the limits for fear of being unable to respond adequately. As this Court recognized in *Buckley*, there is a benefit to the public in general if candidates accept public subsidies and thus reduce their need to aggressively solicit contributions.

> In this case, Congress was legislating for the "general welfare" – to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising.

424 U.S. at 91. Reducing the candidates' need to solicit contributions also reduces the potential for the corruption or the appearance of corruption that can result from large

contributions and gives candidates more time to meet voters and publicly debate the issues. The legislature believes that the independent expenditure provisions are an important part of the State's public campaign financing scheme.

The Eighth Circuit erred in holding that because candidate participation in Minnesota's public campaign financing was nearly 100 percent before the enactment of section 10A.25, subd. 13, the State has no legitimate interest in providing further incentives for candidates to accept the voluntary spending limits and public subsidies. App. at A12. If anything, the high participation rates before the enactment of the new law *heightens* the State's interest in seeing that these rates do not drop significantly as a result of the increased likelihood that more independent expenditures will be made against candidates in the future.

Moreover, participation rates near 100 percent in the past certainly do not guarantee full participation rates in the future. The record in this case shows that, in the past, participation rates have fluctuated. For example, in 1982, the participation rate for all candidates was 89 percent. By the 1986 election, the rate had dropped to 80 percent. In 1988, it rose again to 89 percent. It cannot be said with assurance that without the package of incentives provided in the law, including the independent expenditure provisions, the figure will not drop significantly in the future. Because the maintenance of a high participation rate in the public campaign financing statutory scheme is directly related to the State's compelling interest in preventing corruption or the appearance of corruption in the election of its government officials, the independent

expenditure provisions are constitutional even if they do burden free speech.

II. THIS CASE PRESENTS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW THAT HAS POTENTIAL NATIONWIDE RAMIFICATIONS.

As discussed above, this case presents a fundamental issue of First Amendment law – namely, whether the government violates the free speech rights of someone when it helps someone else respond to that speech. The resolution of this issue is, of course, very important to the citizens of the State of Minnesota insofar as the independent expenditure provisions are an integral part of the public campaign financing scheme that the Minnesota Legislature enacted to promote fairness and public confidence in the political process. As noted above, this Court has expressly recognized the many benefits of public financing of political campaigns.

The issue in this case also has potential nationwide importance, as just last session Congress considered nearly identical provisions in two federal campaign reform bills. Under the bill passed by the Senate, eligible candidates would receive federal funds to offset any independent expenditure of $10,000 or more ($1,000 or more in the 20 days preceding the election). The use of the federal subsidy would also not count against the candidates' spending limits. S. 3, 103d Cong., 1st Sess., § 604 (1993). Similarly, under the bill passed by the House, candidates would receive communications vouchers (which could be used to purchase broadcast time, print advertisements, or campaign materials or

defray postage expenses) to offset independent expenditures totaling $10,000 or more and the vouchers would not count against the candidates' spending limits. H.R. 3, 103d Cong., 1st Sess., § 604 (1993).[14] The two bills also contained independent expenditure reporting obligations very similar to those in the Minnesota law. S. 3 at § 133; H.R. 3 at § 301.

The House Committee on Administration discussed the growing national concern over independent expenditures and echoed a number of the points made by Petitioners in this case:

> We must especially take care in assuring that no candidate who participates in the voluntary system and thus agrees to limits on his or her ability to raise and spend money is not [sic] ambushed by an outside group, free to spend all it wishes, with the candidate being unduly restrained to respond effectively.
>
> . . . .
>
> These provisions adhere to First Amendment values by allowing for an increase in debate and an increase in the voices which may be heard. We emphasize that the persons making the independent expenditures are not restricted; they may do so in unlimited amounts. Thus, these provisions enhance the ability to speak, thus, living up to the admonition of the Supreme Court in *Buckley* that "[l]egislation to enhance First Amendment values is the rule, not the exception." (citation omitted).

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[14] In addition, under the two bills, broadcasters would be required to permit candidates time to respond to advertisements funded by independent expenditures. S. 3 at § 202; H.R. 3 at § 303.

H.R. Rep. No. 103-375, 103d Cong., 1st Sess., pt. 1, at 53 (1993).

The Court's resolution of the constitutionality of such independent expenditure provisions would aid Congress in its continuing debate over national election reform. Moreover, this case presents an excellent opportunity for the Court to clarify the contours of First Amendment law in this area.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: November 30, 1994

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2387

Scott Day, Treasurer of IMPACE-MEA; IMPACE-MEA, a Political Fund; Steve Frazier, a Minnesota taxpayer and contributor to IMPACE-MEA; Richard Kimbler, a taxpayer and an Independent Republican candidate for Secretary of State,

Appellants,

v.

John L. Holahan, Jr., in his capacity as Chair of the Ethical Practices Board, or his successor,

Appellee.

Appeals from the United States District Court for the District of Minnesota.

No. 94-2388

Minnesota Citizens Concerned for Life, Inc.,

Appellant,

Jacqueline A. Schwietz, individually and as Treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates; Eileen Angell,

Plaintiffs,

Mitchell Hoyt Unruh; Lorie Erickson,

Appellants,

v.

John L. Holahan, Jr., in his capacity as Chair of the Ethical Practices Board; Hubert H. Humphrey, III, in his capacity as Attorney General of the State of Minnesota,

Appellees.

No. 94-2390

Minnesota Citizens Concerned for Life, Inc.,

Plaintiff,

Jacqueline A. Schwietz, individually and as Treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates,

Appellant,

Eileen Angell; Mitchell Hoyt Unruh; Lori Erickson,

Plaintiffs,

v.

John L. Holahan, Jr., in his capacity as Chair of the Ethical Practices Board; Hubert H. Humphrey, III, in his capacity as Attorney General of the State of Minnesota,

Appellees.

No. 94-2587

Minnesota Citizens Concerned for Life, Inc.; Jacqueline A. Schwietz, individually and as Treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates; Eileen Angell; Mitchell Hoyt Unruh; Lori Erickson,

Appellees,

v.

John L. Holahan, Jr., in his capacity as Chair of the Ethical Practices Board; Hubert H. Humphrey, III, in his capacity as Attorney General of the State of Minnesota,

Appellants.

Submitted: August 4, 1994

Filed: September 1, 1994

Before BOWMAN and LOKEN, Circuit Judges, and STEVENS,* District Judge.

BOWMAN Circuit Judge.

These consolidated appeals and a cross-appeal challenge the District Court's decision granting summary judgment for and against the appellants and cross-appellees on various constitutional challenges to sections of the campaign reform laws enacted during Minnesota's 1993 legislative session. We granted expedited review of the District Courts' orders. Having reviewed *de novo* the decision to grant summary judgment (there are no disputed issues of fact), we now affirm in part and reverse in part, and remand to the District Court.

IMPACE-MEA is the registered political fund of the Minnesota Education Association, and Scott Day is treasurer of the fund. Steve Frazier is a contributor to IMPACE-MEA and Richard Kimbler is a candidate for Minnesota secretary of state. We will refer to these appellants (plaintiffs below) collectively as IMPACE.

Minnesota Citizens Concerned for Life, Inc., is a nonprofit corporation organized under Minnesota law. Mitchell Hoyt Unruh intends to be a candidate for the Minnesota House of Representatives this year (presumably by now that intent is a reality) and to be bound by the applicable Minnesota campaign finance and ethics laws.

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* The HONORABLE JOSEPH E. STEVENS, JR., Chief Judge, United States District Court for the Western District of Missouri, sitting by designation.

Lori Erickson was a candidate for the Minnesota Senate in 1990 and 1992, plans to run again in 1996, and likewise intends to be bound by applicable state law. We will refer to these appellants (plaintiffs below) collectively as MCCL.

Appellant and cross-appellee Jacqueline A. Schwietz (a plaintiff below) is treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates (MCCL-CSPC), a political fund. Cross-appellee Eileen Angell (a plaintiff below) is a contributor to MCCL-CSPC.

Appellee and cross-appellant John L. Holahan Jr. (a defendant below) is chairman of the Minnesota Ethical Practices Board,[1] which is responsible for the administration, interpretation, and enforcement of the statutes at issue in this case. Appellee and cross-appellant Hubert H. Humphrey III (a defendant below) is Minnesota Attorney General. We will refer to Holahan and Humphrey, collectively or individually, as the state.

I.

A.

Among the 1993 changes and additions to the Minnesota campaign finance and ethics laws was this provision directed to independent expenditures:

> **independent expenditures; limits increased.** (a) The expenditure limits in this section are increased by the sum of independent

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[1] Holahan was substituted for Vanne Owens Hayes, who was the chairman of the Minnesota Ethical Practices Board when plaintiffs filed suit.

> expenditures made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents, other than expenditures by an association targeted to inform solely its own dues-paying members of the association's position on a candidate.
>
> (b) Within 48 hours after receipt of an expenditure report or notice required by section 10A.20, subdivision 3, 6, or 6b, the board shall notify each candidate in the race of the increase in the expenditure limit for the candidates against whom the independent expenditures have been made.
>
> (c) Within three days after providing this notice, the board shall pay each candidate against whom the independent expenditures have been made, if the candidate is eligible to receive a public subsidy and has raised twice the minimum match required, an additional public subsidy equal to one-half the independent expenditures. The amount needed to pay the additional public subsidy under this subdivision is appropriated from the general fund to the board.

Minn. Stat. § 10A.25 subd. 13 (Supp. 1993).

IMPACE, Schwietz, and MCCL make several constitutional challenges to this statute. Because we hold that it violates the First Amendment, we do not reach the other constitutional issues raised.

The District Court concluded that section 10A.25 subd. 13 was content-neutral and was not restrictive of speech (the latter conclusion making the first irrelevant), and ended its analysis there. We think the District Court

took too narrow an approach in considering whether section 10A.25 subd. 13 restricts speech and whether the restriction is content-based, and therefore erred in holding that the First Amendment was not implicated.

Under Chapter 10A of the Minnesota Statutes, an independent expenditure is defined as "an expenditure expressly advocating the election or defeat of a clearly identified candidate," but one made neither with the consent or authorization of the candidate nor at his request or suggestion. *Id.* § 10A.01 subd. 10b (Supp. 1993). Once any individual, political committee, or political fund makes (or becomes obligated to make) an independent expenditure of more than $100 on behalf of any candidate, or against any candidate, the following scenario is mandated by section 10A.25 subd. 13:

The candidate whose defeat is advocated (or whose opponent's election is encouraged) by the independent expenditure has her own expenditure limits increased by the amount of the independent expenditure. *Id.* § 10A.25 subd. 13 (a). The Minnesota Ethical Practices Board then must pay her, if she is eligible to receive a public subsidy and has raised two times the minimum amount required for a match, an additional public subsidy equal to one-half the amount of the independent expenditure.[2] Thus,

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[2] There seems to be a genuine question here whether the Minnesota Ethical Practices Board can implement this statute and still comply with the terms of other Minnesota campaign finance laws. Section 10A.25 subd. 13 requires that the additional subsidy be paid six days (by the time all the statutory notices are given) after the independent expenditure is made (or obligated to be made). It does not exclude independent

by advocating a candidate's defeat (or her opponent's victory) via an independent expenditure, the individual, committee, or fund working for the candidate's defeat instead has increased the maximum amount she may spend *and* given her the wherewithal to increase that spending – merely by exercising a First Amendment right to make expenditures opposing her or supporting her opponent. Thus the individual or group intending to contribute to her defeat becomes directly responsible for adding to her campaign coffers. To the extent that a candidate's campaign is enhanced by the operation of the statute, the political speech of the individual or group who made the independent expenditure "against" her (or in favor of her opponent) is impaired.

It is clear that independent expenditures are protected speech. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our

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expenditures made against primary candidates from the calculation of the additional subsidy, yet such candidates cannot be paid an additional public subsidy because they are ineligible for *any* public subsidy until they win the primary. *See* Minn. Stat. § 10A.31 subd. 6 (Supp. 1993). The state acknowledges this outcome. Brief for Appellee/Cross-Appellant at 7 ("Therefore, Minn. Stat. § 10A.25, subd. 13 (Supp. 1993), has no application to independent expenditures made in connection with a primary election."). By the same token, winning primary candidates will not be eligible for a public subsidy unless and until they win five percent or ten percent (depending upon the office sought) of the total vote in the general election. Minn. Stat. § 10A.31 subd. 7 (Supp. 1993). Since election results must be certified before this determination can be made, there seem to be no circumstances in which the Board will be able to pay the additional subsidy within the six days required by law.

Constitution. The First Amendment affords the broadest protection to such political expression. . . . " *Buckley v. Valeo,* 424 U.S. 1, 14 (1976) (per curiam).[3] It is equally clear that section 10A.25 subd. 13 infringes on that protected speech because of the chilling effect the statute has on the political speech of the person or group making the independent expenditure. As the potential "independent expenders" allege in their briefs (and as at least one sponsor of the legislation intended[4]), the mere enactment of section 10A.25 subd. 13 already has prevented many if not most potential independent expenditures from ever being made. The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditures, chills the free exercise of that protected speech. This "self-censorship" that has occurred even before the state implements the statute's mandates is no less a burden on speech that is

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[3] To the extent the statute encroaches upon the ability of "like-minded persons to pool their resources in furtherance of common political goals," it also implicates "protected associational freedoms." *Buckley v. Valeo,* 424 U.S. 1, 22 (1976) (per curiam).

[4] The appellants offered evidence that senator John Marty, then chairman of the Senate Ethics and Campaign Reform Committee and chief author of the senate bill, explained to the Senate Committee on Finance how the legislation would prevent or dramatically limit independent expenditures, a goal that he recognized could not be accomplished directly because it would violate the First Amendment. *See* Affidavit of Frank J. Walz at 10-12 (Feb. 23, 1994).

susceptible to constitutional challenge than is direct government censorship. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988).

Our conclusion that the most fundamental of rights is infringed by Section 10A.25 subd. 13 does not end our inquiry, however. We now must decide whether the statute is content-neutral or content-based, "not always a simple task." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994). But that determination is critical, as it controls the level of scrutiny we apply in assessing whether the infringement results in a constitutional violation. Having reviewed the teachings of the Supreme Court on this subject and applied them to this statute, we conclude that section 10A.25 subd. 13 is content-based.

Section 10A.25 subd. 13 singles out particular political speech – that which advocates the defeat of a candidate and/or supports the election of her opponents – for negative treatment that the state applies to no other variety of speech. *See Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992) ("Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech. . . . "). We have no difficulty concluding that this is a statute that "by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed," and thus it cannot be content-neutral. *Turner Broadcasting*, 114 S. Ct. at 2459. Independent expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger the statute's limit-increasing and money-shifting provisions. We are bound to

"apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.*

Notwithstanding the content-based infringement on protected constitutional rights perpetrated by section 10A.25 subd. 13, the statute may be upheld as against constitutional challenge if the state can show that it is narrowly drawn to serve a compelling state interest. *See Boos v. Barry*, 485 U.S. 312, 321 (1988). We hold that the state has made no such showing.

The state's professed interest "is the goal of enhancing the public's confidence in the political process by ensuring the viability of the legislature's statutory scheme designed to encourage candidates to accept the voluntary campaign expenditures [sic] of section 10A.25 and the accompanying public subsidies." Brief of Appellee/Cross-Appellant at 23. While this may be a noble goal, we are not certain it is a sufficiently "compelling" interest to justify the burden that the statute imposes upon speech. We do not decide that issue, however, because we hold that, with candidate participation in public campaign financing nearing 100% *before* enactment of section 10A.25 subd. 13, the interest, no matter how compelling in the abstract, is not legitimate.

In 1988, eighty-nine percent of candidates for the Minnesota House of Representatives agreed to spending limits. State of Minnesota Ethical Practices Board, Ethical Practices Board Issues Summary of 1992 Campaign Finance Reports for State Candidates, Political Committees, and Political Funds 2 (July 2, 1993). In 1990, the total for all state candidates was ninety-six percent, and in

1992 – still before the enactment of the campaign reform legislation challenged here – ninety-seven percent of the state legislative candidates filing for office agreed to abide by spending limits in order to receive a public subsidy.[5] *Id.* Clearly, the campaign reform legislation was not necessary to encourage candidates' involvement in public campaign financing, as participation was approaching 100% before the new campaign finance laws were passed in 1993.[6] One hardly could be faulted for concluding that this "compelling" state interest was contrived for purposes of this litigation.

Moreover, it occurs to us that no statute that infringes on First Amendment rights can be considered "narrowly tailored" to meet the state's purported interest in these circumstances. Surely the three percent of non-participants could be brought in by means less burdensome to constitutional rights – assuming that group can be brought in at all. In any event, we have our doubts that this statutory scheme would achieve much success in increasing candidate participation in public campaign financing, when the chances of picking up the "bonus"

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[5] Because the statistics for the three years were for different groups of candidates, it is not possible to compare the figures directly. Nevertheless, there is no argument from the state contesting the proposition that participation in the public campaign financing scheme is very high, nearing 100%.

[6] To the extent that the state's brief can be read as arguing that the level of candidate participation in publicly financed campaigns may be eroded in the absence of these limitations on the speech and association rights of those who wish to make independent expenditures, the argument lacks factual support and must be regarded as wholly speculative.

subsidy are so remote. A candidate cannot qualify for the additional subsidy unless particular speech is made against her (or in favor of her opposition) by others who, as we noted above, are discouraged from exercising their rights to so speak by the very same statutory scheme that provides for the bonus subsidy. We have no doubt that section 10A.25 subd. 13 is assuredly *not* "necessary to serve the asserted interest." *Burson,* 112 S. Ct. at 1852 (1992).

Even if we were to hold that the statute is content-neutral and thus "pose[s] a less substantial risk of excising certain ideas or viewpoints from the public dialogue," *Turner Broadcasting,* 114 S. Ct. at 2459, we nevertheless would conclude that it violates the First Amendment even examining it with the less exacting scrutiny required when the infringement on speech is content-neutral.

A content-neutral statute will survive a First Amendment challenge if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 2469 (quoting *United States v. O'Brien,* 391 U.S. 367, 377 (1968)). Regardless of whether or not the asserted governmental interest in instilling public confidence in the election process is "substantial," section 10A.25 subd. 13 cannot logically be characterized as "essential" to furthering the state's interest. As discussed above, no more than an additional three percent of all candidates could be brought into the public campaign financing scheme (given that ninety-seven percent

already participate). Therefore, even if section 10A.25 subd. 13 were content-neutral, the statute's negative impact on political speech must be a violation of the First Amendment rights of those who wish to make the independent expenditures at issue. The statute's burden on First Amendment rights does not satisfy strict, intermediate, or even the most cursory scrutiny.

We remand to the District Court with instructions to enter judgment for the plaintiffs on this issue and to permanently enjoin the implementation of section 10A.25 subd. 13 of the Minnesota Statutes.

B.

IMPACE and Schwietz also challenge the companion independent expenditure reporting and notice statute, Minn. Stat. § 10A.20 subd. 6b (Supp. 1993), as unconstitutionally vague and overbroad. We do not consider those arguments, as we conclude that section 10A.20 subd. 6b cannot stand in light of our holding that section 10A.25 subd. 13 is unconstitutional.

The Minnesota campaign ethics law provides detailed requirements for the reporting of election campaign expenditures, including independent expenditures, separate and apart from those found in section 10A.20 subd. 6b. *See* Minn. Stat. § 10A.20 (1992 & Supp. 1993). Therefore the requirements of section 10A.20 subd. 6b may be redundant in serving any legitimate purpose and thus unconstitutionally burdensome even if section 10A.25 subd. 13 were constitutionally sound. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 92 (1982) (noting "three government interests sufficient in

general to justify requiring disclosure of information concerning campaign contributions and expenditures: enhancement of voters' knowledge about a candidate's possible allegiances and interests, deterrence of corruption, and the enforcement of contribution limitations") (footnote omitted). But section 10A.25 subd. 13 violates the First Amendment, and subdivision 6b of section 10A.20 is directed exclusively to independent expenditures, clearly for the purpose of implementing subdivision 13 of section 10A.25. With section 10A.25 subd. 13 declared unconstitutional, the state cannot "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963). We hold that section 10A.20 subd. 6b is not severable from section 10A.25 subd. 13. Because the latter subdivision is unconstitutional, the former subdivision also must fall.

We remand to the District Court with instructions to enter judgment for the plaintiffs on this issue and to enjoin permanently the enforcement of section 10A.20 subd. 6b of the Minnesota Statutes.

II.

MCCL argues that the District Court erred in granting summary judgment to the state on MCCL's challenge to three provisions of Minnesota's fair campaign practices law that concern corporate political contributions, Minn. Stat. § 211B.15 (Supp. 1993).

MCCL contends that the subdivision prohibiting corporations from making independent expenditures to promote the election or defeat of a candidate, *id.* § 211B.15 subd. 3, is vague and overbroad. MCCL further argues that the subdivision that restricts corporate expenditures concerning the appointment of public officials and forbids a corporation's contribution of the "free service of its . . . members," *id.* § 211B.15 subd. 2, violates the First Amendment. Finally, MCCL challenges as unconstitutional as applied to it the limited statutory exemption of nonprofit corporations from the balance of the section on corporate political contributions. *Id.* § 211B.15 subd. 15. Our decision on the challenge to section 211B.15 subd. 15 makes it unnecessary for us to consider the other issues.

The "nonprofit corporate exemption" relieves a nonprofit corporation from the corporate prohibitions set forth under section 211B.15 (including the prohibitions set forth in subdivisions 2 and 3) if that corporation:

> (1) cannot engage in business activities;
>
> (2) has no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and
>
> (3) was not established by a business corporation or a labor union and has a policy not to accept significant contributions from those entities.

Id. § 211B.15 subd. 15.

The state acknowledges that these three conditions are drawn from the Supreme Court's opinion in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263-64 (1986) (hereinafter *MCFL*). The Minnesota legislature

looked at three features of MCFL that, in the Supreme Court's view, qualified MCFL for exemption, and translated them into requirements for exemption under Minnesota law. The state claims that, because MCCL's activities did not strictly conform to the statute (MCCL engages in incidental business activities and has no policy of refusing significant contributions from corporations), MCCL is not exempt from the prohibitions of section 211B.15. We disagree, and hold that section 211B.15 subd. 15 is unconstitutional as applied to MCCL.

The general corporate restrictions on political speech as they appear in section 211B.15 could be declared unconstitutional if they were applied to nonprofit corporations organized solely for political purposes, as the "practical effect may be to discourage protected speech." *MCFL*, 479 U.S. at 255 (plurality opinion). The state interest in preventing corruption, or the appearance of corruption, in the political process has been recognized as a compelling state interest that justifies restrictions on political contributions by business corporations. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990). But those same corporate campaign finance restrictions, if applied broadly to all nonprofit corporations, are not narrowly tailored to serve that purpose. *See id.* at 660. The state does not contend otherwise, and to avoid potential constitutional problems the Minnesota legislature enacted section 211B.15 subd. 15, the exemption for certain nonprofit corporations.

As noted above, the conditions that nonprofit corporations must meet to qualify for the exemption were taken from the Minnesota legislature's reading of the Supreme Court's opinion in *MCFL*. But the analysis in

MCFL, upon which section 211B.15 subd. 15 was based, is not a constitutional test for when a nonprofit corporation must be exempt. Instead it is an application, in three parts, of First Amendment jurisprudence to the facts in *MCFL*. The state goes too far in concluding that the factual findings of *MCFL* translate into absolutes in legal applications.

Two of the subsections under section 211B.15 subd. 15 pose problems for MCCL's qualification as an exempt nonprofit corporation as the state applies the statute to MCCL. First, MCCL engages in some minor business activities that generate minimal income but are incidental to its political purpose: it rents its mailing list and sells advertisements in its newsletter. The statute says MCCL "cannot engage in business activities" and still qualify as an exempt nonprofit. Minn. Stat. § 211B.15 subd. 15(1). The Supreme Court in *MCFL*, in noting MCFL's avoidance of business activity as a reason to exempt it from Massachusetts's campaign regulations for corporations, set forth a rationale for its conclusion that is more relevant here than the particular fact that MCFL did not engage in business activities. The Court concluded that the lack of business activity "ensures that political resources reflect political support." *MCFL*, 479 U.S. at 264. MCCL describes its own business activities as incidental to its political purposes, and the income derived from them as minimal, and the state does not dispute those contentions. Moreover, the business activities in which MCCL engages, we believe, would not draw income from those who were not supportive of MCCL's political agenda and thus such income would manifest political support. It is reasonable to assume that only

those who are like-minded would pay for the use of MCCL's mailing list.[7] As for the newsletter, again presumably only those sympathetic to MCCL's views would pay to place an advertisement that would be read by MCCL supporters. *Cf. supra* note 6. So looking to the purpose of this condition for exemption and the facts here, rather than merely the factual application in *MCFL*, we hold that section 211B.15 subd. 15(1) as applied to MCCL to render it non-exempt, on the facts before us at this time, results in an unconstitutional infringement on MCCL's First Amendment rights.

MCCL also runs afoul of Minnesota's conditions for nonprofit exemption because it does not have "a policy not to accept significant contributions" from business corporations or labor unions. Minn. Stat. § 211B.15 subd. 15(3). In fact, it has accepted corporate contributions. The state does not dispute MCCL's claim that the contributions are not "significant," but faults MCCL because it does not have a "policy" not to accept significant contributions. Again we consider the purpose underlying the Supreme Court's conclusion that this particular fact of MCFL's operations should relieve it of the campaign finance burdens that Massachusetts put upon for-profit corporations, rather than relying only upon the factual finding itself.

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[7] The exception here would be some aberrant plan to use the mailing list to harass MCCL's supporters. We assume that MCCL screens requests for its mailing list to filter such uses. In any event the list-renter would know that the fee he pays is going to support MCCL's activities.

The Supreme Court concluded that MCFL's refusal to accept significant corporate contributions "prevents such corporations [as MCFL] from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 264. This statement from the Court convinces us that the key issue here is the *amount* of for-profit corporate funding a nonprofit receives, rather than the establishment of a policy not to accept significant amounts. Unlike the situation in *Austin*, where the nonprofit organization was a chamber of commerce three-fourths of whose members were business entities, the facts before us in this case present no risk of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. The state, far from having shown that MCCL is amassing great wealth as a result of corporate donations, implicitly concedes that MCCL has not received any significant contributions from for-profit corporations.

"Some corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." *MCFL*, 479 U.S. at 263. MCCL, despite its failure to fit precisely into the facts of *MCFL*, is clearly that sort of corporation. We hold that section 211B.15 subd. 15 is unconstitutional as applied to MCCL, and that the facts before us today should qualify MCCL for exempt nonprofit status. Should these facts change, however, particularly as to the amount of revenue MCCL receives from

its business activities, the business activities that produce the revenue, or the amount of contributions it receives from for-profit corporations or labor unions, the state may wish to revisit MCCL's qualification for the exemption.

We remand to the District Court with instructions to enter judgment for MCCL on its claim concerning the application of section 211B.15 subd. 15.

III.

For its cross-appeal, the state claims the District Court erred in granting summary judgment for Schwietz and Angell, finding Minn. Stat. § 10A.27 subd. 12 (Supp. 1993) unconstitutional and enjoining its enforcement. Under that section of the campaign reform law, a political committee or political fund cannot "accept aggregate contributions from an individual, political committee, or political fund in an amount more that [sic] $100 a year." *Id.* We hold that the $100 limit is so low as to infringe upon the citizens' First Amendment right to political association and free political expression.

As emphasized by the Supreme Court's decision in *Buckley v. Valeo,* it is clear that state-enforced limits on campaign contributions and expenditures stifle First Amendment freedoms. *Buckley,* 424 U.S. at 19, 22. Here, because the limit applies to contributions both by and to political committees and funds, the limit affects not only free political speech but also free association, the "tradition of volunteer committees for collective action. . . . [B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost."

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal., 454 U.S. 290, 294 (1981); *accord Buckley*, 424 U.S. at 22, 25-26.

It also is well established that Minnesota's declared purpose in enacting its $100 limit – to avoid corruption or the appearance of corruption in the political process that could result from large amounts of special interest money circulating in the system – is a compelling state interest. *Buckley*, 424 U.S. at 26-27; *see also FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.").

But the fighting issue here is whether a $100 limit on contributions to political committees or funds is narrowly tailored to serve the state's interest, given the burden it imposes on political speech. *Buckley*, 424 U.S. at 25. We hold that it is not.[8] "Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political

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[8] The District Court did not reach the equal protection argument raised in that court. It appears that the legislators who enacted the $100 limit on contributions to political committees and funds, and the governor who signed the limit into law, approved limits on election-year contributions to themselves that were many times higher that the $100 limit on contributions to committees and funds. *See* Minn. Stat. § 10A.27 subd. 1 (Supp. 1993). Because we hold the statute unconstitutional under the First Amendment, we do not address the Fourteenth Amendment issue.

committees from amassing the resources necessary for effective advocacy." *Id.* at 21. And the concern of a political *quid pro quo* for large contributions, which becomes a possibility when the contribution is to an individual candidate, *id.* at 26 ("To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."), is not present when the contribution is given to a political committee or fund that by itself does not have legislative power.

The *Buckley* Court, eighteen years ago, found that a $1000 limit – ten times the limit at issue here – was sufficiently high to pass constitutional muster as narrowly tailored to serve the state's concern for the integrity of the political system. We realize that the *Buckley* limit was never declared to be a constitutional minimum, but it does provide us with some guidance and a frame of reference in evaluating the constitutionality of Minnesota's $100 limit.

Among the undisputed facts relied upon by the District Court is the fact that a $100 contribution in 1976 would have a value of $40.60 in 1994 dollars, or approximately four percent of the $1000 limit approved in *Buckley*. The undisputed facts also show that one-fourth to one-third of MCCL-CSPC's contributions exceeded $100 in the most recent election cycle (presumably the cycle before the one now underway). Based on these facts, we agree with the District Court that a $100 limit on contributions to or by political committees and funds significantly impairs the ability of individuals and political committees and funds to exercise their First Amendment rights. An annual $100 limit on contributions to or by

political funds and committees is too low to allow meaningful participation in protected political speech and association, and thus is not narrowly tailored to serve the state's legitimate interest in protecting the integrity of the political system. Accordingly, we hold that the $100 limit violates the protections afforded by the First Amendment for free political speech and free association.

The judgment of the District Court invalidating section 10A.27 subd. 12 and permanently enjoining its enforcement is affirmed.

IV.

To summarize, we reverse the judgment of the District Court on the facial challenges to section 10A.25 subd. 13 and section 10A.20 subd. 6b of the Minnesota Statutes. Further, we reverse the District Court's judgment on MCCL's as-applied challenge to section 211B.15 subd. 15. We affirm the judgment of the District Court finding section 10A.27 subd. 12 unconstitutional and permanently enjoining its enforcement.

The case is remanded to the District Court for the entry of judgment and the appropriate injunctions in accordance with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

SCOTT DAY, Treasurer of IMPACE-MEA; IMPACE-MEA; and STEVE FRAZIER and RICHARD KIMBLER,

Plaintiffs,

v.

VANNE OWENS HAYES, in her capacity as Chair of the Ethical Practices Board,

Defendant.

and

MINNESOTA CITIZENS CONCERNED FOR LIFE, INC.; JACQUELINE A. SCHWIETZ, Treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates; EILEEN ANGELL, MITCHELL HOYT UNRUH, and LORI ERICKSON,

Plaintiffs,

v.

VANNE OWENS HAYES, as Chair of the State Ethical Practices Board; and HUBERT HUMPHREY III, as Attorney General of the State of Minnesota,

Defendants.

Civil File
No. 3-93-857

MEMORANDUM & ORDER

Civil File
No. 3-93-876

(Filed
May 27, 1994)

This matter is before the Court upon Plaintiffs' Motions for Summary Judgment. The Court has given these motions expedited consideration due to the significant implications of the challenged statutes in the imminent Minnesota primary and general elections. For the following reasons, the Court grants the motions in part and denies them in part and enters partial judgment in favor of the Plaintiffs and partial judgment in favor of the Defendants.

BACKGROUND

Responding to concerns about the financing of political campaigns and the potential for and perception of corruption of the political process through undue influence of large financial contributors, the 1993 Minnesota Legislature significantly amended state laws governing political campaigns and the financing of those campaigns.[1] The new statute, *inter alia*, (i) provides incentives

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[1] The parties disagree about the intent of the Legislature in enacting the new laws. Each side cites legislative history that it contends shows the intent of the Legislature in enacting the law. Plaintiffs rely primarily on statements made in committee hearings by the principal Senate author of the bill, Senator John Marty. Statements by a single senator in a hearing before a committee of a single body of a bicameral legislature are insufficient to demonstrate the collective intent of the entire legislature in subsequently enacting the final version of a bill. It is admittedly difficult to glean the intent of the enacting legislature from the legislative record before the Court. However, based on the entire record, including but not limited to the text of the bill; available legislative history, background information and documents; and the present representations and arguments of the executive branch of Minnesota

for candidates to accept voluntary spending limits including public subsidies to candidates who accept the limits and meet other eligibility criteria; (ii) reduces the amounts of contributions candidates may accept from political committees, political funds, lobbyists and certain individuals; (iii) limits the amount of contributions a political committee or fund may accept from a single donor in a year; (iv) imposes reporting requirements on persons and entities making "independent expenditures" and (v) provides for public subsidies to some candidates who have such independent expenditures made against them. *See* Minn. Stat. Chapter 10A (Supp. 1993) (scattered provisions). The 1993 Legislature also amended Minn. Stat. § 211B.15, a statute that prohibits corporations from making certain types of campaign contributions and expenditures. Plaintiff MCCL, Inc. challenges several provisions of the statute as amended.

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government; the Court concludes that it appears the intent of the enacting legislature was to reduce the potential for corruption and the appearance of corruption in the political processes.

Even if this Court were to somehow determine that the small minority of senators quoted in the Plaintiffs' supporting materials spoke for the entire Legislature, their comments are insufficient to show that the Legislature acted with the intent of suppressing the First Amendment rights of the Plaintiffs. *Cf. Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (in different context (equal protection), Court held that, in order to invalidate as improperly motivated a facially neutral legislative scheme, a Plaintiff must show that "a state legislature selected or affirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group.")

The Plaintiffs brought suit seeking to invalidate several provisions of the above-described laws on December 20, 1993.[2] They challenge the constitutionality of provisions of the law that require reporting of independent expenditures and provide for corresponding subsidies to candidates who meet certain conditions; a provision limiting individual contributions to political funds and committees to $100 per year; and the corporate contribution

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[2] Plaintiffs in Civil File No. 3-93-857 are IMPACE-MEA, the registered political fund of the Minnesota Education Association; Scott Day, the Treasurer of IMPACE-MEA; Steve Frazier, a Minnesota taxpayer and contributor to IMPACE-MEA; and Richard Kimbler, a candidate for Minnesota Secretary of State (where appropriate, the Court occasionally refers to the Plaintiffs in this action collectively, as "IMPACE"). The Defendant in that action is Vanne Owens Hayes, sued in her capacity as Chair of the Minnesota Board of Ethical Practices. Plaintiffs in Civil File No. 3-93-876 are Minnesota Citizens Concerned for Life, Inc. (MCCL); Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates (MCCLCSPC), a registered political fund of MCCL; Jacqueline A. Schwietz, the Treasurer of MCCLCSPC; Eileen Angell, a resident of Minnesota and contributor to MCCLCSPC; Lori Erickson, a Minnesota resident who intends to run for election to the Minnesota Senate and to be bound by the campaign expenditure limits of the challenged statutes; and Mitchell Hoyt Unruh, who intends to run for the Minnesota House and be bound by the same limits (where appropriate, the Court occasionally refers to the Plaintiffs in this action collectively as "MCCL"). The Defendants in that action are Vanne Owens Hayes and Hubert H. Humphrey III, sued in his capacity as Attorney General of the State of Minnesota. Because the actions pose related challenges to the new laws, the Court considers the two actions together. Except were otherwise noted, the Court shall refer to all plaintiffs in both actions collectively as "Plaintiffs" and to both defendants as "Defendants."

and expenditure prohibitions, as applied to Plaintiff MCCL, Inc. Both groups of Plaintiffs seek declaratory judgment that the challenged provisions of Minn. Stat. § 10A violate the First and Fourteenth Amendments to the United States Constitution and seek to permanently enjoin the Defendants from enforcing the challenged statutes. In addition, Plaintiff MCCL, Inc. seeks a declaration that Minn. Stat. § 211B (the "Campaign Act") is unconstitutional and seeks to enjoin Defendants from enforcing the statute against it. The Court denied the Plaintiffs' motions for preliminary injunction on January 5, 1994. Both groups of Plaintiffs now seek summary judgment.

DISCUSSION

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir. 1992). A court may grant summary judgment in favor of a nonmoving party. *See Hvamstad v. Suhler*, 727 F. Supp. 511 (D. Minn. 1989), *aff'd*, 915 F.2d 1218 (8th Cir. 1990); *see also, Celotex*, 477 U.S. at 326 ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence.") The parties are in agreement as to essentially all material facts and have agreed that this matter should be decided in summary fashion based on the existing record. *See Johnson v. Bismarck Public School Dist.*, 949 F.2d 1000, 1004-05 (8th Cir. 1991) (when parties agree that issues should be decided in summary fashion,

judgment in favor of either moving party or non-moving party is permissible). Hence, the Court's task here is to determine questions of law and enter judgment in this matter.

I. Justiciability[3]

At the time of the Court's denial of Plaintiffs' motions for preliminary injunction, it was not clear that the Plaintiffs had alleged sufficient interests and facts to confer standing and to make the case ripe for this Court's review. In the interim, Plaintiffs have remedied those arguable deficiencies by adding several individual Plaintiffs and by alleging facts sufficient to show that candidates they oppose will likely be eligible for public subsidy in the coming election cycle. However, it bears repeating that the mere making and reporting of an independent expenditure by a person or group opposed to a candidate is not sufficient to qualify that candidate for a public subsidy. In order to qualify for a public subsidy based on an independent expenditure made against her, a candidate must have previously accepted voluntary spending limits, must meet public subsidy eligibility

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[3] The Defendants originally contended Plaintiff MCCL, Inc. lacked standing to bring its challenge to Minn. Stat. § 211B because its articles of incorporation prohibited it from participating in political campaigns. However, the Defendants later determined that MCCL, Inc. (MCCL) had repealed that provision of its articles of incorporation. Accordingly, the Defendants withdrew their argument that MCCL lacked standing to challenged Section 211B. The Court agrees with the Defendants' assessment and will thus consider the merits of MCCL's Section 211B challenge. *See infra* at IV.

requirements, and must have raised twice the minimum match otherwise required. *See* Minn. Stat. § 10A.25 subd. 13.[4]

Plaintiff Steve Frazier contends he is entitled to challenge this law both as a taxpayer and as an ordinary citizen. Frazier argues that Minn. Stat. § 10A.25 violates his First Amendment rights by effectively forcing him to subsidize a candidate he opposes through government expenditure of funds it obtains through the state income tax. Because Frazier is a Minnesota taxpayer, he contributes to the collective pool of state funds whence the State would draw funds to pay subsidies to eligible candidates under Chapter 10A.

Generally, suits based on taxpayer status and ideological injury arising from that status are not cognizable in federal court. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613 (1989). Taxpayers are generally not allowed to bring suits to challenge laws of general applicability based on their taxpayer status because their injury is not separate and "distinct from that suffered by other taxpayers . . . " *Id.* The Supreme Court carved an exception to the prohibition on such "taxpayer standing" in *Flast v. Cohen*, 392 U.S. 83 (1968). However, subsequent cases have effectively delineated the very narrow scope of that exception – the Supreme Court has found taxpayer standing *only*

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[4] Similarly, the increased expenditure ceiling provided by Minn. Stat. § 10A.25 subd. 13(a) applies to only those candidates who have voluntarily accepted the expenditure limits in the first instance *and* whose major party opponent also agrees to be bound by the voluntary limits. *See* Minn. Stat. § 10A.25 subd. 10 (Supp. 1993).

when the taxpayer challenges government spending alleged to violate the Establishment Clause of the First Amendment. It has rejected taxpayer standing in every other case originally brought in federal court. *See, e.g., United States v. Richardson,* 418 U.S. 166 (1974); *Valley Forge Christian College v. Americans United for Sep. of Church & State,* 454 U.S. 464 (1982); *see also Bowen v. Kendrick,* 487 U.S. 589 (1988); *Marsh v. Chambers,* 463 U.S. 783 (1983) (establishment clause challenges); *cf. ASARCO,* 490 U.S. at 616-24 (1989) (allowing standing for Supreme Court review of action brought in state court, though standing would not exist if action originally brought in federal court).

Frazier does not allege an injury arising from the challenged statutes that is distinguishable from the generalized injury suffered by innumerable taxpayers who disagree with government expenditures of tax-generated funds. As the Supreme Court noted more than seventy years ago, suits based on a taxpayer's generalized grievance are not justiciable in federal court because the taxpayer's

> interest in the moneys of the Treasury – partly realized from taxation and partly from other sources – is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention]

Frothingham v. Mellon, 262 U.S. 447, 487 (1923). Further, Frazier does not allege that the challenged statutes violate the Establishment Clause of the First Amendment

and thus does not fit within the narrow exception to the general prohibition against taxpayer standing. Accordingly, the Court finds Frazier lacks taxpayer standing.

Frazier more likely has general citizen standing to challenge Chapter 10A, because he is a member of and contributor to IMPACE-MEA. However, his challenge based on that status is indistinguishable from the challenge brought by other individual parties to these suits and the Court need not separately discuss that aspect of Frazier's challenge.

II. Independent Expenditures Provisions[5]

Plaintiffs challenge the "independent expenditures" provisions of Chapter 10A, which provide, in pertinent part:

> **Subd. 6b. Independent expenditures; notice.**
>
> (a) Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of $100, other than an expenditure by an association targeted to inform solely its own dues-

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[5] The IMPACE Plaintiffs also contend that the challenged provisions of Chapter 10A violate Art. 1, Sec. 3 of the Minnesota Constitution. However, Plaintiffs do not argue that the protections afforded by the Minnesota Constitution are different from those provided by the First Amendment to the United States Constitution and offer no separate analysis of the application of the Minnesota Constitution to the statutes at issue. The Court will assume for purposes of this analysis that the reach and protections of Minn. Const. Art. 1, Sec. 3 are co-extensive with those of U.S. Const. Am. 1.

paying members of the association's position on a candidate, the individual, political committee, or political fund shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy of the affidavit on each candidate in the affected race and on the treasurer of the candidate's principal campaign committee. The affidavit must contain the information with respect to the expenditure that is required to be reported under subdivision 3, paragraph (g); except that if an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.

(b) An individual or the treasurer of a political committee or political fund who fails to give notice as required by this subdivision, or who files a false affidavit of notice, is guilty of a gross misdemeanor and is subject to a civil fine of up to four times the amount of the independent expenditure stated in the notice or of which notice was required, whichever is greater.

Minn. Stat. § 10A.20 subd. 6b (Supp. 1993).

Subd. 13. Independent expenditures; limits increased.

(a) The expenditure limits in this section are increased by the sum of independent expenditures made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents, other than expenditures by an association targeted to inform solely its own dues-paying members of the association's position on a candidate.

(b) Within 48 hours after receipt of an expenditure report or notice required by section 10A.20, subdivision 3, 6, or 6b, the board shall notify each candidate in the race of the increase in the expenditure limit for the candidates against whom the independent expenditures have been made.

(c) Within three days after providing this notice, the board shall pay each candidate against whom the independent expenditures have been made, if the candidate is eligible to receive a public subsidy and has raised twice the minimum match required, an additional public subsidy equal to one-half the independent expenditures. The amount needed to pay the additional public subsidy under this subdivision is appropriated from the general fund to the board.

Minn. Stat. § 10A.25 subd. 13 (Supp. 1993).

Subd. 10b. Independent expenditure. "Independent expenditure" means an expenditure expressly advocating the election or defeat of a clearly identified candidate, which expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate. An expenditure by a political party or political party unit, as defined in section 10A.275, subdivision 3, in a race where the political party has a candidate on the ballot is not an independent expenditure.

Minn. Stat. § 10A.01 Subd. 10b (Supp. 1993).

A. Restriction or Burden on Free Speech

The Plaintiffs contend that the independent expenditures statute is unconstitutional because it burdens their exercise of free speech rights. In support of this contention, Plaintiffs argue that, through the statute's subsidy and increased expenditure provisions, the Government will force Plaintiffs to subsidize the speech of a candidate they oppose as the price of independent expenditures in favor of a candidate they support. *See* Minn. Stat. § 10A.25 subd. 13 (Supp. 1993). Stated differently, Plaintiffs contend they are faced with a choice "between not speaking or subsidizing the campaign coffers of the candidate being opposed" and argue that difficult choice impermissibly burdens their exercise of free speech rights.

Plaintiffs' argument that if they decide to make independent expenditures they will be forced to subsidize the speech of their opponents misperceives the nature of the subsidy provided by the statute. Unlike the governmental regulations struck down in *Miami Herald* and *Pacific Gas & Electric*, which forced private entities to fund the speech of their opponents directly through expenditure of their own private funds, the present statute provides for a *public* subsidy to opponents of candidates supported by the Plaintiffs. *See Pacific Gas & Elec. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The Supreme Court made it clear in *Pacific Gas* that content-neutral, public subsidies of political speech are permissible. *Pacific Gas*, 475 U.S. at 14-15. The flaw in the government regulation of speech in *Pacific Gas* was that it

> identifie[d] a favored speaker based on the identity of the interests that [the speaker] may represent . . . and force[d] the speaker's opponent – not the taxpaying public – to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of the disfavored speaker.

Id. at 15 (citations omitted). The present statute is content neutral. Any subsidy or increase in expenditure limits is triggered solely by the event of an independent expenditure, regardless of the interest of the speaker or the content of the speaker's message. Further, the entity making the independent expenditure is not forced to expend its own private resources to facilitate the expression of an opposing viewpoint.

Contrary to the arguments of the Plaintiffs, the law imposes no restrictions on their ability to make independent expenditures. The independent expenditures law imposes no limit on the amount a person or entity may spend and does not otherwise constrain Plaintiffs' exercise of protected speech rights. It merely provides that, under some conditions, an opposing candidate may be entitled to spend additional amounts on his own campaign message and that he may also be entitled to an additional public subsidy. Plaintiffs are free to make as many independent expenditures as they desire without restraint, censure or penalty by the Government. The independent expenditures law imposes no significant restriction on the Plaintiffs' speech.[6] Instead, the law

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[6] Plaintiffs do not argue that the independent expenditure reporting requirements would impose a heavy or costly administrative burden that would chill their exercise of their First

merely provides that, in certain limited circumstances, independent expenditures may trigger an opportunity for an opponent to respond using public funds, additional private funds or both.

Plaintiffs' contention that the public subsidy provision unfairly advantages the opposing candidate or constitutes an improper use of public funds is equally unavailing. The government has no obligation to subsidize all speech equally. *See Regan v. Taxation with Representation of Washington,* 461 U.S. 540, 546-47. If the subsidy is content-neutral, government's decision to subsidize only certain speech does not abridge the First Amendment rights of those who do not receive the subsidy. *Regan,* 461 U.S. at 546 (1983); *see Rust v. Sullivan,* 111 S. Ct. 1759 (1991); *Planned Parenthood v. Agency for Int'l Dev.,* 915 F.2d 59 (2d Cir. 1990), *cert. denied,* 111 S. Ct. 2257 (1991). In the present case, in furtherance of what it believes is the public interest, the Government has chosen to subsidize the speech of candidates against whom independent expenditures are made while refusing to subsidize the speech of persons and entities that make independent expenditures. Because the subsidies are content-neutral and not "aimed at the suppression of dangerous ideas," they do not run afoul of the guarantees of the First Amendment. *Regan,* 461 U.S. at 550.

The independent reporting and subsidy provisions of the statute may make the Plaintiffs' strategic decisions regarding independent expenditures and weighing their

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Amendment rights. *Cf. Austin v. Michigan Chamber of Commerce,* 110 S. Ct. 1391, 1396-97 (1990).

possible consequences more difficult. However, the First Amendment does not guarantee the Plaintiffs freedom from difficult choices. A government regulation which forces a civic organization to make a difficult choice with respect to the exercise of constitutional rights does not, without more, violate the organization's First Amendment rights. *See Brookins v. O'Bannon*, 699 F.2d 648 (3d Cir. 1983). Here, though the independent expenditures statute may in some circumstances create a dilemma for the Plaintiffs, they have not shown that such a dilemma would impermissibly restrict their First Amendment rights.

Because the independent expenditure provisions would facilitate more speech in some circumstances, they may actually advance core values underlying the First Amendment. A primary purpose of the First Amendment is "to secure the widest possible dissemination of information from diverse and antagonistic sources." *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *see Red Lion Broadcasting Co. v. Fed. Communications Comm'n*, 395 U.S. 367 (1969). To the extent the statute provides for increased debate about issues of public concern raised by an independent expenditure, it promotes the free and open debate the First Amendment seeks to foster and protect. *See id.; cf. Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (public financing of campaigns "furthers, not abridges, pertinent First Amendment values"). The Court concludes that the independent expenditures provisions of the statute do not constitute an unconstitutional burden on free speech.

B. Vagueness and Overbreadth Challenges

1. Vagueness

Plaintiffs also contend that the independent expenditures notice provisions should be declared void for vagueness. Due process requires that a law whose violation is punishable by criminal penalty must state clearly what conduct it requires or prohibits. *Kolender v. Lawson*, 461 U.S. 352 (1983). A penal statute that fails to define the criminal offense clearly in terms understandable by ordinary people, is "void-for-vagueness" because it violates constitutional due process requirements. *Id.* at 357. The vagueness doctrine and underlying due process concerns are implicated here because the independent expenditures notice statute provides that failure to comply with the requirements of the statute is punishable as a gross misdemeanor, *see* Minn. Stat. § 10A.20 subd. 6b(b), and because the statute regulates expressive activity.

The independent expenditures notice provision essentially provides the mechanism through which the Ethical Practices Board (Board) would determine when a candidate – who meets all the other necessary preconditions – is eligible for additional public or private funding on the basis of an independent expenditure made on behalf of his or her opponent. For purposes of the vagueness dispute, the notice obligation is set forth in the following section:

> Subd. 6b. Independent expenditures; notice. (a) Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of

> $100 . . . the [obligor] shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy of the affidavit on each candidate in the affected race and on the treasurer of the candidate's principal campaign committee . . . [I]f an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.
>
> (b) An individual or the treasurer of a political committee or political fund who fails to give notice as required by this subdivision, or who files a false affidavit of notice, is guilty of a gross misdemeanor and is subject to a civil fine of up to four times the amount of the independent expenditure stated in the notice or of which notice was required, whichever is greater.

Minn. Stat. § 10A.20 subd. 6(b) (Supp. 1993).

Plaintiffs assert that the phrase "becomes obligated by written or oral agreement to make an independent expenditure" is so indefinite that they are unable to determine their reporting obligations under the statute. They argue that the nature of independent political expenditures and the imprecision of the term "obligated" make it impossible to determine when they are required to report the independent expenditures to the Board. They conclude that they are subject to risk of penal sanction without adequate notice of what is necessary to conform their conduct to the requirements of the statute.

The Plaintiffs' vagueness challenge to the independent expenditures reporting procedure presents a somewhat closer question than their challenges to the more

substantive provisions of the law. *See supra.* II.A. The language of the independent expenditure reporting requirements might have been written more clearly or with greater precision. However, because the Legislature is necessarily confined to words to express the requirements of the law, the Court cannot expect the parameters of the law to be delineated with mathematical precision or certainty. *See Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989); *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972). Whether this Court or the Plaintiffs might have written the statute differently is not the standard that guides the Court's review. The proper inquiry is whether the language of statute as enacted is sufficiently definite to allow ordinary citizens to understand what is required of them and to discourage arbitrary and discriminatory enforcement. *See Kolender,* 461 U.S. at 357; *Grayned,* 408 U.S. 104. The Court concludes that, under the due process analysis and standards articulated in *Kolender* and its antecedents, Plaintiffs' vagueness challenge must fail.

The existence of a legal obligation is readily determined by common experience and the application of well-established principles of contract law and related equitable principles.[7] Whether an obligation exists between a person or entity making an independent

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[7] It is reasonable to assume the statute refers to a legal obligation, because the State is without authority to determine the existence of a moral obligation or to attempt to enforce any variety of obligation not grounded in statutory or common law. The Court also notes that none of the Plaintiffs suggests [sic] that the alternative event triggering a reporting obligation, the actual making of an independent expenditure, should be held void for vagueness.

expenditure and the provider of a good or service in exchange for that expenditure does not require speculation or more sophistication or experience than that of an ordinary consumer – either a person is legally obligated to make an expenditure or she is not.[8]

Political funds and committees like MCCLCSPC and IMPACE-MEA have a higher degree of sophistication and experience in matters of political expenditures and obligations than the ordinary person. In light of that experience, their contention that they would be unable to determine whether or when they become obligated to make an expenditure lacks credibility. Certainly the public media and vendors of other goods and services related to political communications would be unwilling to provide such services if they believed that purchasers of

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[8] The individual Plaintiffs do not allege their right to make independent expenditures directly in their capacity as individuals is infringed by the reporting requirement or that the reporting requirement as applied to individuals should be held void for vagueness. The individual Plaintiffs have not alleged sufficient facts to confer standing to bring such a challenge. However, even if such a challenge were appropriately presented in this action, the Court doubts the individual Plaintiffs could prevail. In the course of daily life, people enter various transactions and oral and written agreements creating binding obligations. The conduct of commerce depends on ordinary consumers and merchants understanding the nature of obligations – including obligations to make expenditures – and how and when those obligations arise. Although possibly somewhat less sophisticated than a political fund or organization, a person of ordinary experience understands when she is legally "obligated." Therefore, the language of the statute is likely not impermissibly vague on its face, even with respect to its application to individuals.

those goods and services would seriously contend they were unable to determine if they had incurred an obligation to pay for those services. The creation of a binding obligation provides a clear line of demarcation between negotiations and discussions regarding independent expenditures, which entities have no duty to report, and the conclusive decision to make an independent expenditure, which they must report. If, for example, a political committee contemplates an independent expenditure and discusses the *possibility* of making such an expenditure with a vendor, but enters no binding agreement, the committee is not *obligated* to make such an expenditure and, under the terms of the statute, the reporting requirement is not triggered.

Several of the Plaintiffs' vagueness arguments fail to distinguish between the *timing* of the creation of an obligation and the objective existence of an obligation. The Court understands that the nature of political campaigns in general, and independent expenditures in particular, makes the timing of decisions regarding the creation of obligations to make such expenditures unpredictable and uncertain. In some cases, the creation of an obligation to make an expenditure and the actual expenditure may occur nearly simultaneously. Further, for a variety of reasons, a person or entity may plan to make an independent expenditure and later decide not to make that expenditure. However, the timing of the ultimate decision regarding an independent expenditure does not determine whether an entity is obligated to make such an expenditure. Similarly, if an entity enters a binding obligation to make an independent expenditure and later for its own reasons decides not to publish (in the broad

sense) the good or service procured by the expenditure, the obligation still exists.[9]

The existence of an obligation is not vague or indeterminate. People of ordinary experience and intelligence understand when they have entered an obligation; a law imposing reporting requirements on those who enter independent expenditure obligations does not require them to guess at its meaning or expose them to the risk of penalty without fair warning. *See Kolender*, 461 U.S. 352 (1983); *Grayned*, 408 U.S. 104, 110 (1972); *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 740 (1970).

Further, if Plaintiffs or similarly situated entities or individuals actually were unable to determine whether particular events or circumstances triggered a reporting obligation, they could request an advisory opinion from the Board to resolve their dilemma. Minn. Stat. § 10A.02 subd. 12 provides a mechanism whereby persons subject to the requirements of the independent expenditures statute may seek an advisory opinion to guide their conduct, "based upon real or hypothetical situations."[10] The

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[9] For example, if a political committee contracts with a public relations firm to pay to have campaign flyers promoting a specific candidate printed and distributed and, after the flyers are printed, the committee decides not to distribute those flyers, the binding obligation created by the contract remains. Presumably, the obligation would trigger the statute's reporting requirements even though ultimately it did not result in public expressive activity on behalf of the candidate.

[10] The advisory opinion section provides, in pertinent part:

> The [ethical practices] board may issue and publish advisory opinions on the requirements of this chapter based upon real or hypothetical situations. An

United States Supreme Court suggested that such an advisory opinion mechanism could alleviate vagueness problems, if the mechanism were available to all those who are subject to the requirements of the campaign finance law. *Buckley v. Valeo*, 424 U.S. 1, 40 n.47 (1986). After Congress amended the statute at issue in *Buckley* to make the advisory opinion procedure available to all "persons," the D.C. Circuit opined that mechanism would substantially reduce whatever "chill" of free speech rights exercise might be induced by arguable vagueness of the language of the law. *Martin Tractor v. FEC*, 627 F.2d 375, 384-86 (D.C. Cir. 1980); *see also, United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973). Finally, this Court, reviewing the same advisory opinion mechanism's application to a different provision of Chapter 10A, held that mechanism could serve to alleviate vagueness problems. *See Bang v. Chase*, 442 F. Supp. 758, 769-70, including n.33 (D. Minn. 1977), *aff'd*, 436 U.S. 941 (1978). After reviewing three advisory opinions issued by the Board pursuant to Section 10A.02 subd. 12, the Court concluded that those opinions eliminated the arguable vagueness of the challenged statute. *Id.*

> application for an advisory opinion may be made only by an individual or association who wishes to use the opinion to guide the individual's or the association's own conduct. The board shall issue written opinions on all such questions submitted to it within 30 days after receipt of written application, unless a majority of the board agrees to extend the time limit. . . .

Minn. Stat. § 10A.02 subd. 12 (Supp. 1993).

The challenged statutes are not unconstitutionally vague. The substantive provisions of the statute alone are sufficiently clear and definite to satisfy the requirements of due process and the First Amendment. The ready availability of authoritative advisory opinions serves to eliminate any residual concern of confusion Plaintiffs may have regarding the application of the statute and their obligations thereunder.

2. Overbreadth

In a related objection, Plaintiffs contend that the reporting requirement may compel them to report obligations to make expenditures which are not ultimately translated into published political speech in favor of a candidate. The Court interprets this complaint to state a modified "overbreadth" or "overinclusiveness" argument that also incorporates other objections previously discussed. The Plaintiffs essentially argue that due to their failure to translate obligations to speech, their political opponents may be aided by an additional government subsidy when the candidate Plaintiffs support has received no benefit from the expenditure or obligation. This, they apparently conclude, constitutes an overbroad regulation of their political speech because it subsidizes their opponent and effectively penalizes them for speech they did not make. The Supreme Court has emphasized the limited application of the overbreadth doctrine, stating "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in

relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The Plaintiffs' hybrid argument fails for two reasons. Initially, the Court previously concluded that the independent expenditures provisions do not burden the Plaintiffs' exercise of rights guaranteed by the First Amendment. The reporting requirement does not restrict Plaintiffs' freedom to make independent expenditures – they remain free to make or not make whatever expenditures they wish. Plaintiffs offer no argument to suggest that the law would burden the exercise of First Amendment rights of others not before the Court. Because neither the Plaintiffs' nor any other citizen's First Amendment rights are burdened by the reporting requirement, overbreadth analysis is not appropriate. Second, as previously discussed, the Government has no obligation to subsidize various types of expression equally, so long as the subsidy scheme is content-neutral. *See Regan v. Taxation with Representation*, 461 U.S. 540 (1988); *Pacific Gas & Elec. v. Public Utilities Comm'n of California*, 475 U.S. 1, 15-16 (1986). The fact that the triggering event for government subsidy of a candidate's campaign expression may or may not correlate with an actual expenditure in support of that candidate's opponent is not relevant to the principles expressed in *Regan* and its progeny. Plaintiffs have not shown that the independent expenditures provisions of the statute are overbroad.

III. $100 Contribution Limit

Plaintiffs MCCLCSPC and its member/officers (collectively MCCLCSPC) also contend that the $100 contribution limit imposed by Minn. Stat. §10A.27 subd. 12 impermissibly infringes their right of free association guaranteed by the First Amendment and violates the Fourteenth Amendment guarantee of equal protection of the laws. The law provides:

> **Subd. 12. Contributions to other political committees or funds.** The treasurer of a political committee or political fund, other than a candidate's principal campaign committee or a political party unit as defined in section 10A.275, shall not permit the political committee or political fund to accept aggregate contributions from an individual, political committee, or political fund in an amount more than $100 a year.

Minn. Stat § 10A.27 subd. 12.

The Court agrees that the contribution limit restricts freedom of association. However, under the analysis set forth in *Buckley*, even a significant government interference with rights of political association may be sustained if it is justified by an important government interest and if it employs means narrowly drawn to avoid needless infringement of associational freedoms. *Buckley*, 424 U.S. at 25-26 (1976). The Supreme Court extended the rule announced in *Buckley* to multicandidate political committees like Plaintiff MCCLCSPC in *California Med. Ass'n v. Fed. Elections Comm'n*, 453 U.S. 182 (1981). The government regulations approved in *Buckley* and *California Med. Ass'n* were political contribution ceilings similar in

design and intent to the limit imposed by Minn. Stat. § 10A.27 subd. 12.

As in *Buckley*, a primary concern of the Minnesota Legislature in enacting this statute was prevention of the appearance and reality of corruption of the political process through the exercise of undue and improper influence by persons and entities making large financial contributions. The legislative history suggests that the Legislature also intended the contribution limit to restore and maintain citizens' confidence in their government and elected officials. "Preserving the integrity of the electoral process [and] preventing corruption . . . are interests of the highest importance. Preservation of the individual citizen's confidence in government is equally important." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (citations omitted). Based on the entire record, *see* n. 1, *supra*, the Court concludes that the Defendants have shown that the contribution limit is supported by compelling government interests.

The Government must also show the contribution limit is narrowly tailored to serve those compelling interests and to avoid unnecessary infringement of associational freedoms. *Buckley*, 424 U.S. at 25-26. In its prior order denying Plaintiff's request for injunctive relief, the court determined that the relatively low limit on monetary contributions did not offend the rights of association implicit in the First Amendment. *See* Memorandum and Order dated January 5, 1994; *see also NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460 (1958). Further review of the record, economic data and relevant case law compels the Court to conclude the limit is too low to pass constitutional muster.

The *Buckley* Court held that, as long as a reviewing court is satisfied that some limit on contributions is necessary, it need not determine the precise amount which will effectuate the government's important interest. *Buckley*, 424 U.S. at 30. The Court further noted that differences in degree of regulation may be significant if they amount to "difference in kind." *Id.* (citations omitted). With respect to contribution limits, the "kind" of regulation at issue in *Buckley* and virtually all subsequent reported federal cases is a limit which discourages the potential for, "actuality and appearance of corruption [of the political process] resulting from *large* individual financial contributions" *Buckley*, 424 U.S. at 26 (emphasis added). Here, the Court finds that the $100 limit is so low that it renders the limit "different in kind" from those previously upheld by other federal courts and concludes that the limit is not narrowly tailored to serve the government's compelling interest.

The Court has reviewed several post-*Buckley* cases in which courts upheld limits on contributions to multicandidate political committees. None of those cases upheld a limit below $1000. *See California Med. Ass'n v. FEC*, 453 U.S. 182 (1981) (upholding $5000 annual limit on contributions to political committees); *Mintz v. Barthelemy*, 722 F.Supp. 273, 281-82 (E.D. La. 1989), *aff'd*, 891 F.2d 520 (5th Cir. 1989) (upholding $5000 contribution limit for local mayoral election); *Mott v. FEC*, 494 F. Supp. 131 (D.D.C. 1980) ($5000 contribution limit upheld); *Matter of Vanderlinde*, 366 S.E.2d 631, 636 (W. Va. 1988) (upholding $1000 contribution limit); *Florida Police Benevolent Ass'n v. Florida Election Comm'n*, 430 So.2d 483 (Fla. Dist. Ct. App.) (1983) ($1000 contribution limit upheld); *cf.*

Gard v. Wisconsin State Elections Bd., 456 N.W. 2d 809 (Wis. 1990) (upheld $11,000 cap on aggregate contributions candidate could accept from political committees), *cert. denied*, 111 S.Ct. 512 (1990). The $100 contribution limit imposed by the Minnesota statute is ten percent, or one-tenth, of the lowest limit upheld in the cases this Court has reviewed.

More than eighteen years ago, the Supreme Court upheld a $1000 limit on contributions to campaign committees and individuals. The *Buckley* Court noted that, in the preceding two-year election cycle, only 5.1% of all contributions to candidates for the United States Congress exceeded $1000. *Buckley*, 424 U.S. at 21, n.23. The Court also reviewed the individual contributions exceeding of $1000 received by the various appellants, finding that several received no such contributions. *Id.* at 34, n.40 In no instance did such contributions constitute more than .25 percent of the total number of contributions. *See id.* It appears that very few donors contributed more than $1000 to candidates and committees in 1976; those making donations exceeding $1000 were plainly "large" contributors, implicating the government's interest in combatting [sic] political corruption. *See Buckley*, 424 U.S. at 26. Thus, the Court could readily find that a $1000 limit narrowly focused on truly large contributions, which posed the greatest threat of corruption.

Here, the record shows that in the last election cycle at least one-fourth and possibly as much as one-third of the total monetary value of MCCLCSPC's contributions came from contributions exceeding $100. (*See* First & Second Schwietz Affid.) It appears that the $100 limit would significantly reduce the ability of MCCLCSPC –

and thereby the collective ability of its individual contributors – to provide financial support to candidates. *Cf. Buckley,* 424 U.S. at 29 ($1000 contribution limit allowed individuals to financially support candidates and committees "to a limited but nonetheless substantial extent").

More significantly, inflation has substantially eroded the relative value of the dollar since the 1976 *Buckley* decision. As measured by the Consumer Price Index, one dollar in 1992 was equivalent to approximately $.406 in 1976. This means that, for purposes of comparison, today's $100 contribution limit translates to approximately $40.60 at the same time of *Buckley.*[11] Thus, in real terms, the contribution limit prescribed by Minn. Stat. § 10.27 subd. 12 is approximately 4 percent or 1/25 of the limit approved in *Buckley.* In the Court's view, the difference in these two limits is so substantial that the Minnesota statute constitutes a regulatory "difference in kind."

A $100 limit on contributions regulates too broadly by limiting the rights of association of relatively small contributors along with those of large contributors. The Supreme Court has held that the Constitution allows

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[11] The most recent year for which annual Consumer Price Index (CPI) data is available is 1992. The Court made its calculations using the "All items" CPI for 1976 and 1992. *See* 1993 Statistical Abstract of the United States, table no. 756. The 1976 CPI was 56.9 and the same datum for 1992 was 140.3. Thus, the appropriate "deflator" to convert 1992 dollars to 1976 dollars is 56.9/140.3 = .406. Multiplying .406 times $100 yields the value of the present $100 contribution limit in 1976 dollars, $40.60. Because there has been additional inflation between December 31, 1992 and the present, the actual value of 100 mid-1994 dollars in 1976 terms would be lower than $40.60.

limitation of contributions only to the extent such limits are necessary to reduce actual and apparent corruption engendered by *large* individual financial contributions. *Buckley*, 424 U.S. 1, 25-29. The Court concludes that the $100 limit is not narrowly drawn to serve those ends. The limit is so low that it unnecessarily limits the rights of citizens to engage in legitimate expressive political activity and abridges their rights of association guaranteed by the First Amendment. *See id.* Therefore, the Defendants and the State of Minnesota may not enforce Minn. Stat. §10.27 subd. 12. Because the Court has held Subdivision 12 invalid under the First Amendment, it need not assess the Plaintiffs' equal protection challenge to the same statute.[12]

Having held Subdivision 12 unconstitutional, the Court must determine whether that holding requires it to invalidate the entire statute. The Minnesota statute governing this question provides:

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[12] Assuming, *arguendo*, that political committees and candidates are similarly situated for equal protection purposes, the Court would apply a "strict scrutiny" test to determine whether the differential contribution limits applied to political committees and individual candidates are allowed by the Equal Protection Clause of the Fourteenth Amendment. Because the Court previously determined the statute implicates Plaintiffs' fundamental right of association under the First Amendment, heightened scrutiny of the differential classification would be appropriate. *See New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13-16 (1988); *Lyng v. Automobile Workers*, 485 U.S. 360, 365-66 (1988). While the Defendants have adduced ample evidence to show the statutory classification has a rational basis, it is doubtful that the law could withstand strict scrutiny.

> Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Minn. Stat. §645.20. The foregoing statute "creates a presumption of severability which is rebutted only if the court concludes the Minnesota legislature would not have enacted the valid portions without the void ones" *Bang v. Chase*, 442 F. Supp. 758, 770 (1977). As a general rule, an unconstitutional statutory amendment is ineffective and leaves the statute as it was prior to the amendment. *Bongard v. Bongard*, 342 N.W.2d 156, 159 (Minn. App. 1983).

The other provisions of Chapter 10A (the "Ethics in Government Act") do not depend on Section 10A.27 subd. 12. All are separate, independent and enforceable without reference to Subdivision 12. In fact, most of the provisions of Chapter 10A were enacted prior to the 1993 amendments that created Subdivision 12. The Court finds no evidence to suggest that the void provision is an indispensable part of the statutory scheme or that the Legislature would not have enacted Chapter 10A or the

remaining 1993 amendments without the invalid contribution limit. Therefore, the Court will invalidate only the single provision it finds unconstitutional. Minn. Stat. §10A.27. subd. 12.

IV. Minn. Stat. § 211B's Corporate Contribution Prohibition

Plaintiff MCCL, Inc. (MCCL) challenges Minn. Stat. § 211B's limits on political contributions by corporations. MCCL is a nonprofit corporation which engages in limited business activities and accepts contributions from for-profit business corporations. MCCL has made expenditures in the past for the purpose of advocacy on behalf of candidates for public office and desires to continue to do so. It has not made independent expenditures to promote or defeat candidates in the past but desires to make such expenditures in the future. The challenged statute, which would prohibit MCCL as presently organized from making both direct contributions and independent expenditures, provides in relevant part:

> **211B.15. Corporate political contributions**
>
> **Subdivision 1. Definitions.** For purposes of this section, "corporation" means:
>
> (1) a corporation organized for profit that does business in this state; [or]
>
> (2) a nonprofit corporation that carries out activities in this state
>
> * * *
>
> **Subd. 2. Prohibited contributions.** A corporation may not make a contribution or offer or

agree to make a contribution, directly or indirectly, of any money, property, free service of its officers, employees, or members, or thing of monetary value to a major political party, organization, committee, or individual to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office. For the purpose of this subdivision, "contribution" includes an expenditure to promote or defeat the election or nomination of a candidate to a political office that is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of, a candidate or committee established to support or oppose a candidate.

Subd. 3. Independent expenditures. A corporation may not make an independent expenditure or offer or agree to make an independent expenditure to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office. For the purpose of this subdivision, "independent expenditure" means an expenditure that is not made with the authorization or expressed or implied consent of, or in cooperation or concert with, or at the request or suggestion of, a candidate or committee established to support or oppose a candidate.

* * *

Subd 15. Nonprofit corporation exemption. The prohibitions in this section do not apply to a nonprofit corporation that:

(1) cannot engage in business activities;

(2) has no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and

(3) was not established by a business corporation or a labor union and has a policy not to accept significant contributions from those entities.

Minn. Stat. § 211B.15 (Supp. 1994).

A. Scope of Regulation

MCCL initially contends that the language of Subdivision 3 is too broad to fit within the allowable scope of government regulation of independent expenditures delineated in *Buckley* and its progeny. The Court understands the Plaintiff to assert a vagueness challenge. Ironically, the Plaintiff's argument here is notable more for its brevity than for its clarity. However, the standards for analyzing a "void-for-vagueness" challenge set forth *supra* at II.B apply equally to MCCL's challenge to Section 211B.15. In *Buckley,* the Supreme Court found statutory limits on independent expenditures "relative to a clearly identified candidate" unconstitutionally vague, but upheld the limit after construing the quoted language of the statute to apply to expenditures "for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley,* 424 U.S. at 44. In the present case, the statute prohibits corporations from making independent expenditures "to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political

office." Minn. Stat. § 211B.15 subd. 3. Unlike the language in *Buckley*, the foregoing requires no limiting construction. A person of ordinary intelligence could readily understand that what is prohibited is any expenditure for communication clearly directed at a specific candidate with the intent of encouraging or discouraging the candidate's election or appointment. In the words of the *Buckley* Court, Subdivision 3 prohibits "communications that in express terms advocate the election or defeat" of a candidate for elective or appointed office. *See id.*

Contrary to MCCL's contention, the fact that the limits of Chapter 211B extend to expenditures to promote or defeat the candidacy of an individual for *appointment* to public office does not violate its First Amendment rights. Although the issue was apparently not presented in *Buckley*, this Court can discern no difference between the importance of the government interest in avoiding corruption in the electoral process and the same interest in the appointment process. For example, corporate expenditures to encourage the appointment of a specific individual to an executive branch position present a similar risk of *quid pro quo* unfair favorable treatment of the supporting corporation by the appointed official. Obviously, such a transaction is equally corrupting and carries equal potential for erosion of citizens' confidence in their government regardless of whether the complicit official is elected or appointed.

MCCL relies on *Bellotti* to support its contention that the State may not regulate corporate expenditures favoring or opposing a candidate for appointment. *Bellotti* stands for the proposition that a state may not prohibit a corporation from spending money to influence public

debate or the outcome of a referendum *on an issue. First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765. *Bellotti* found "[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *Bellotti,* 435 U.S. at 790 (internal citations omitted). *Bellotti* teaches that expenditures on behalf of a candidate, who may be susceptible to improper influence, differ in essential respects from expenditures directed at an inanimate issue of public concern. Those differences do not depend on whether a candidate seeks elected or appointed public office.

B. Non-Profit Corporation Exception

MCCL's principal objection to the corporate political contributions statute is that the First Amendment precludes the State from proscribing independent expenditures by non-profit corporations like MCCL. Due to the "unique state-conferred corporate structure that facilitates the amassing of large corporate treasuries . . . [c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures." *Austin v. Michigan Chamber of Commerce,* 110 S. Ct. 1391, 1398 (1990). The unique legal and economic attributes of corporations thus creates the potential for corruption or the appearance of corruption through corporate political expenditures. *Id.* at 1397-98. Avoidance of such corruption or its appearance is a compelling government interest, justifying some regulation of corporations' political expenditures. *Id.; FEC v. Mass. Citizens for Life,* 479 U.S. 238 (1986) (hereinafter *MCFL*); *cf. Bellotti,*

435 U.S. 765 (1978) (state may not restrict corporate spending to influence public debate or referenda on *issues* because no risk of corruption).[13]

It is well established that states may impose the type of restrictions contained in Minn. Stat. § 211B.15 on *for-profit* corporations. *See MCFL*, 479 U.S. 238; *FEC v. Nat'l Conserv. Pol. Action Comm.*, 470 U.S. 480 (1985); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982). However, in *MCFL*, the Supreme Court carved a narrow exception for non-profit corporations that meet certain criteria. Organizations that meet those three criteria must be exempted from independent expenditure regulation because they pose no danger of corruption of the political process and thus the government lacks the compelling interest necessary to justify regulation. *MCFL*, 479 U.S. at 263-65. The Court specifically found that the defendant non-profit corporation (MCFL) had three attributes that were *essential* to the Court's holding that the government could not regulate the defendant's political expenditures:

> *First*, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . *Third*, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This

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[13] Minn. Stat. § 211B.15 subd. 4 makes clear that corporations may make contributions to promote or defeat a ballot question or to comment on issues of public concern. Thus, the statute complies with the rule announced in *Bellotti*.

> prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.

Id. at 264. Subdivision 15 codifies the requirements for non-profit corporations set forth in *MCFL*, providing that the prohibitions set forth in Chapter 211B do not apply to nonprofit corporations that (1) cannot engage in business activities; (2) have no shareholders; and (3) were not established by a business corporation or labor union and have a policy against accepting contributions from those entities. *See* Minn. Stat. § 211B.15 subd. 15.

MCCL does not have shareholders, but it cannot satisfy the remaining two requirements. Because the *MCFL* Court indicated all three requirements were essential to the non-profit exception, failure to meet any single criterion would be independently sufficient to deny MCCL exemption from the regulation. The corporation admits that it engages in business activities, including rental of its membership list and advertisement sales. (*See* Second Schwietz Affid. ¶ 7). It essentially argues for a *de minimis* exception, contending that its business activities are "incidental to [MCCL]'s primary purpose" and generate relatively little income and thus pose little risk of actual or apparent corruption of the political process. However, neither *MCFL* nor Subdivision 15 provides an exception for "incidental" business activities. *See MCFL*, 479 U.S. at 263 (reason that corporation exempted was not that it posed *lesser* threat of corruption, but that it posed no threat at all).

MCCL similarly contends that it satisfies the third *MCFL* requirement because the contributions it receives from business corporations are relatively small and are

insignificant. The portion of MCCL's receipts derived from corporate contributions or whether corporate contributions are "significant," is irrelevant. MCCL admits it accepts corporate contributions and it has neither alleged nor proved through [sic] that it has a policy against accepting such contributions. Absent a clear enforced policy against accepting contributions, the risk exists that a non-profit corporation could accept large contributions from for-profit business corporations and become an instrument for precisely the type of unfair influence on the political process the limits on for-profit independent expenditures properly seek to eradicate. *See e.g., Austin,* 110 S. Ct. at 1398; *MCFL,* 479 U.S. at 262-64. Because MCCL has no policy against accepting contributions from business corporations, it cannot satisfy the third requirement of the *MCFL* exception. *See id.* 469 U.S. at 264; *FEC v. NRA Pol. Victory Fund,* 778 F. Supp. 62, 64 (D.D.C. 1991), *rev'd on other ground,* 6 F.3d 821 (D.C. Cir. 1993).

Finally, MCCL asserts that Minn. Stat. § 211B.15 subd. 2 violates its First Amendment rights and those of its members "by completely prohibiting MCCL from encouraging its members to volunteer their services to candidates." This contention misconstrues the terms of the statute. The language of the challenged subsection prohibits corporations from contributing "the free service[s] of its . . . members," Minn. Stat. § 211B.15 subd. 2, to a candidate for office or political organization, but says nothing about encouraging members to participate in the political process. The phrase "contribution of free service of its members" implies some ability of the corporation to compel or control the attendance of or provision of other

services by its members, most plausibly because the corporation pays monetary compensation to those members. There is no evidence that MCCL exercises such control over its members. Further, nothing in the statute limits internal communications between a corporation and its members. MCCL remains free to "encourage" its members to voluntarily participate in political activities, as long as the members are acting on their personal time and not as officers or employees of the corporation when they participate in those activities.

MCCL further contends that Subdivision 2 unconstitutionally restricts the right of individuals to participate in the political process. By its terms, the statute applies only to corporations, not to the conduct of individuals. *See* Minn. Stat. § 211B.15 subd. 2. "[S]ervices provided without compensation by an individual volunteering personal time on behalf of a candidate, ballot question, political committee or political fund" are expressly excluded from the distinct statutes governing individual political contributions. *See* Minn. Stat. §§ 10A.01, subd. 7 & 10A.27, subd. 1. Subdivision 2 does not apply to individuals and does not limit their First Amendment rights.

The corporate contributions statute, Minn. Stat. § 211B.15, is not unconstitutionally vague or overinclusive. For purposes of this First Amendment analysis, any differentiation between candidates for appointed and elected public office is a distinction without a difference. MCCL's failure to satisfy two of the three *MCFL* requirements disqualifies it from the narrow non-profit corporation exemption from government regulation. The statute does not otherwise infringe Plaintiffs' constitutional

rights. The State's regulation of corporate political expenditures embodied in Minn. Stat. § 211B.15 is thus constitutional as applied to MCCL.

CONCLUSION

The challenged independent expenditure provisions of Minn. Stat. § 10A are constitutional and the State may enforce those provisions. The $100 contribution limit set forth in Minn. Stat. § 10A.27 subd. 12 is not narrowly tailored to satisfy the government's compelling interest in avoiding the potential for corruption of the political process and the appearance of such corruption. That provision of the statute violates the First Amendment and therefore the State may not enforce Minn. Stat. § 10A.27 subd. 12. The challenged portions of the State's regulation of corporate political contributions and expenditures, set forth in Minn. Stat. § 211B.15, are constitutional, and the State may enforce that statute.

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. The Plaintiffs' motions for summary judgment are GRANTED only to the extent they seek a declaration that Minn. Stat. §10A.27 subd. 12 is unconstitutional and to enjoin Defendants from enforcing that provision;

2. The Clerk of Court shall enter partial judgment in favor of the Plaintiffs in Civil File Nos. 3-93-857 and 3-93-876, declaring Minn. Stat. §10A.27 subd. 12 unconstitutional and permanently enjoining Defendants from enforcing Minn. Stat. §10A.27 subd. 12;

3. The Plaintiffs' motions for summary judgment are DENIED in all other respects;

4. The Clerk of Court shall enter judgment in favor of the Defendants on all Counts of Plaintiffs' Complaints in Civil File Nos. 3-93-857 and 3-93-876, with the exception of the partial judgment in favor of Plaintiffs ordered in Item 2, *supra;* and

5. These suits are DISMISSED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 27, 1994.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court
Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

SCOTT DAY, Treasurer of IMPACE-MEA; IMPACE-MEA; and STEVE FRAZIER and RICHARD KIMBLER,

Plaintiffs,

v.

VANNE OWENS HAYES, in her capacity as Chair of the Ethical Practices Board,

Defendant.

Civil File No. 3-93-857

ORDER AMENDING JUDGMENT

(Filed June 9, 1994)

This matter is before the Court upon the Defendant's Motion for an Order Amending Judgment. The Court previously directed that judgment be entered in this and a related case, in a Memorandum and Order dated May 27, 1994. After review, the Court finds that the May 27 Memorandum and Order contains a clerical error resulting from an oversight by the Court. *See* Fed. R. Civ. P. 60(a). Pursuant to Rule 60, the Court determines that amendment of its prior order and judgment is appropriate.[1]

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[1] The Plaintiffs concur that this amendment of the Court's order and judgment is appropriate. Because this change does not affect the substance of Plaintiffs' pending appeal to the Court of Appeals for the Eighth Circuit, the Court believes this amendment should not necessitate the filing of a new appeal. *See* Fed. R. Civ. P. 60(a). This is particularly true given the

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. Paragraph 2 of the Memorandum and Order dated May 27, 1994 is amended to read:

> "The Clerk of Court shall enter partial judgment in favor of the Plaintiffs in Civil File No. 3-93-876, declaring Minn. Stat. § 10A.27 Subd. 12 unconstitutional and permanently enjoining Defendants from enforcing Minn. Stat. § 10A.27 subd. 12";

and

2. The Clerk of Court shall amend the judgment entered in *Scott Day, et. al. v. Hayes* (Civ. File No. 3-93-857) by deleting the partial judgment entered in favor of the Plaintiffs in that action.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 9, 1994.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court
Judge

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immediacy of the issues presented by the appeal and the concomitant benefits of expeditious appellate review of this Court's decision in this matter.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

SCOTT DAY, Treasurer of IMPACE-MEA; IMPACE-MEA; and STEVE FRAZIER, a Minnesota taxpayer and contributor to IMPACE-MEA,

Plaintiffs,

v.

VANNE OWENS HAYES, in her capacity as Chair of the Ethical Practices Board,

Defendant.

Civil File
No. 3-93-857

and

MINNESOTA CITIZENS CONCERNED FOR LIFE, INC.; JACQUELINE A. SCHWIETZ, Treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates; and EILEEN ANGELL,

Plaintiffs,

v.

VANNE OWENS HAYES, as Chair of the State Ethical Practices Board; and HUBERT HUMPHREY III, as Attorney General of the State of Minnesota,

Defendants.

MEMORANDUM & ORDER

Civil File
No. 3-93-876

(Filed
May 27, 1994)

(Judgment Entd.
May 27, 1994)

This matter is before the Court upon Plaintiffs' motions seeking preliminary injunctions. For the following reasons, the Court denies those motions.

BACKGROUND[1]

Responding to concerns about the financing of political campaigns and the potential for and perception of corruption of the political process through undue influence of large financial contributors, the 1993 Minnesota Legislature significantly amended state laws governing political campaigns and the financing of those campaigns. The new statute, *inter alia*, provides incentives for candidates to accept voluntary spending limits including public subsidies to candidates who accept the limits and meet other eligibility criteria; reduces the amounts of contributions candidates may accept from political committees, political funds, lobbyists and certain individuals; limits the amount of contributions a political committee or fund may accept from a single donor in a year; imposes reporting requirements on persons and entities making "independent expenditures" and provides for public subsidy to some candidates who have such independent expenditures made against them. *See* Minn. Stat. Chapter 10A (Supp. 1993) (scattered provisions).

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[1] At this early stage of the case, very little background discussion is necessary or appropriate. This exposition is intended only to provide a brief description of the parties, the statute and the issues before the Court in the motions for preliminary relief. As necessary, additional facts are set forth in the discussion section.

The Plaintiffs in these two consolidated cases brought suit seeking to invalidate several provisions of the new law on December 20, 1993.[2] The matter is presently before the Court upon Plaintiffs' preliminary injunction motions, which effectively seek to enjoin the Defendants from enforcing two provisions of the new campaign law.[3] Specifically, the Plaintiffs challenge the

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[2] Plaintiffs in Civil File No. 3-93-857 are IMPACE-MEA, the registered political fund of the Minnesota Education Association; Scott Day, the Treasurer of IMPACE-MEA; and Steve Frazier, a Minnesota taxpayer and contributor to IMPACE-MEA. The Defendant in that action is Vanne Owens Hayes, sued in her capacity as Chair of the Minnesota Board of Ethical Practices. Plaintiffs in Civil File No. 4-93-1213 (now renumbered 3-93-876) are Minnesota Citizens Concerned for Life; Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates (MCCLCSPC), a registered political fund of MCCL; Jacqueline A. Schwietz, the Treasurer of MCCLCSPC; Eileen Angell, a resident of Minnesota and contributor to MCCLCSPC. The Defendants in that action are Vanne Owens Hayes and Hubert H. Humphrey III, sued in his capacity as Attorney General of the State of Minnesota. Because the actions pose related challenges to the new law, the Court consolidated the two actions for joint consideration. Except where otherwise noted, the Court shall refer to all plaintiffs in both actions collectively as "Plaintiffs" and to both defendants as "Defendants."

[3] The Court agreed to hear these motions on an expedited schedule because of the statutes' potential application to a special election to fill a vacancy in the Minnesota Legislature, scheduled to be held January 11, 1993. By prior agreement of the parties, the Court today considers only the parties' motions seeking an injunction against enforcement of Minn. Stat. §§ 10A.20 subd. 6b, 10A.25 subd. 13 and 10A.27 subd. 12 (Supp. 1993). After the parties reached this agreement, Plaintiffs in both cases amended their pleadings to add more plaintiffs. Plaintiffs then sought to amend their arguments for a preliminary injunction based on the interests of the new Plaintiffs. The

constitutionality of provisions of the law which require reporting of independent expenditures and provide for corresponding subsidies to candidates who meet certain conditions. They also challenge a provision limiting individual contributions to political funds and committees to $100 per year. The challenged statutes provide, in pertinent part:

> Subd. 6b. Independent expenditures; notice. (a) Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of $100, other than an expenditure by an association targeted to inform solely its own dues-paying members of the association's position on a candidate, the individual, political committee, or political fund shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy of the affidavit on each candidate in the affected race and on the treasurer of the candidate's principal campaign committee. The affidavit must contain the information with respect to the expenditure that is required to be reported under subdivision 3, paragraph (g); except that

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Court does not consider these new arguments for several reasons. Initially, Plaintiffs raise new legal issues in their reply memorandum, affording the Defendants no opportunity to respond. Further, the Court considers these new arguments – presented to the Court late on the day before the hearing on their motions and on the day of the hearing – to be untimely. Finally, and perhaps most significantly, Plaintiffs' assertion of new arguments at the eleventh hour is inconsistent with the agreement of the parties which facilitated this expedited hearing and unfair to the Defendants.

if an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.

(b) An individual or the treasurer of a political committee or political fund who fails to give notice as required by this subdivision, or who files a false affidavit of notice, is guilty of a gross misdemeanor and is subject to a civil fine of up to four times the amount of the independent expenditure stated in the notice or of which notice was required, whichever is greater.

Minn. Stat. 10A.20 subd. 6b (Supp. 1993).

Subd. 13. Independent expenditures; limits increased. (a) The expenditure limits in this section are increased by the sum of independent expenditures made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents, other than expenditures by an association targeted to inform solely its own dues-paying members of the association's position on a candidate.

(b) Within 48 hours after receipt of an expenditure report or notice required by section 10A.20, subdivision 3, 6, or 6b, the board shall notify each candidate in the race of the increase in the expenditure limit for the candidates against whom the independent expenditures have been made.

(c) Within three days after providing this notice, the board shall pay each candidate against whom the independent expenditures have been made, if the candidate is eligible to receive a public subsidy and has raised twice

> the minimum match required, an additional public subsidy equal to one-half the independent expenditures. The amount needed to pay the additional public subsidy under this subdivision is appropriated from the general fund to the board.

Minn. Stat. § 10A.25 subd. 13 (Supp. 1993).

> Subd. 10b. Independent expenditure. "Independent expenditure" means an expenditure expressly advocating the election or defeat of a clearly identified candidate, which expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate. An expenditure by a political party or political party unit, as defined in section 10A.275, subdivision 3, in a race where the political party has a candidate on the ballot is not an independent expenditure.

Minn. Stat. § 10A.01 Subd. 10b (Supp. 1993).

Plaintiffs MCCLCSPC et. al. also challenge the constitutionality of the $100 contribution limit, contending it violates their rights to free political speech and association guaranteed by the First Amendment. That statute provides:

> Subd. 12. Contributions to other political committees or funds. The treasurer of a political committee or political fund, other than a candidate's principal campaign committee or a political party unit as defined in section 10A.275,

> shall not permit the political committee or political fund to accept aggregate contributions from an individual, political committee, or political fund in an amount more than $100 a year.

Minn. Stat. § 10A.27 subd. 12.

DISCUSSION

The Eighth Circuit has established the following analysis to be used in considering a preliminary injunction motion:

> [W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Sys., Inc. v. C. L. Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981); *accord Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085, 1090 (D. Minn. 1981), *aff'd*, 684 F.2d 565 (8th Cir. 1982). The burden of proving entitlement to a preliminary injunction is on the movant. *General Mills, Inc. v. Kellogg*, 824 F.2d 622, 624-25 (8th Cir. 1987). In determining whether a preliminary injunction should issue, a court should balance the equities by considering all the factors in a flexible inquiry in which no single factor should be determinative. *Dataphase* 640 F.2d at 113; *General Mills*, 824 F.2d at 624-25. However, the threshold inquiry is whether movant has shown a threat of irreparable injury; failure to show a threat of irreparable harm is a sufficient ground to deny a motion for preliminary injunction. *Gelco*

v. Conniston Partners, 811 F.2d 414, 418 (8th Cir. 1987); *Dataphase,* 640 F.2d at 114 n.9.

I. Threat of Irreparable Harm

A. Independent Expenditures Provisions

Plaintiffs claim that compliance with the "independent expenditures" provisions of the statute would harm them irreparably by limiting their exercise of speech rights guaranteed by the First Amendment. They argue that the subsidy scheme embodied in the statute forces them to choose between refraining from protected political speech and engaging in such speech with the knowledge that an indirect effect of their speech will be to subsidize the speech of their political opponent. They conclude that, by forcing them to make that choice, the state impermissibly restricts the exercise of their First Amendment right to free speech.

The loss of First Amendment freedoms, even for a brief period, constitutes irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373 (1976). However, Plaintiffs cannot show irreparable injury merely by invoking their rights under the First Amendment. *See Rushia v. Town of Ashburnham, Mass.* 701 F.2d 7, 10 (1st Cir. 1983) (citing *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931-32 (1975)). They must show that the statute has a real, unconstitutional chilling effect on free expression. *See Hohe v. Casey,* 868 F.2d 69, 73 (3d Cir. 1989), *cert. denied,* 493 U.S. 848 (1989), and cases cited therein. Incidental inhibition of First Amendment Rights is insufficient to establish irreparable injury. Rather, such harm results from purposeful government suppression of speech. *Id.* Plaintiffs do not make a showing of such

direct, purposeful suppression of their speech. Thus they fail to establish that they will suffer irreparable harm if denied the preliminary relief they seek with respect to the independent expenditures law.

Initially, Plaintiffs have not alleged facts to suggest that any candidate they oppose will likely be eligible for public subsidy in the upcoming election cycle. The mere making and reporting of an independent expenditure by a person or group opposed to a candidate is not sufficient to qualify that candidate for a public subsidy. In order to qualify for a public subsidy based on an independent expenditure made against her, a candidate must have previously accepted voluntary spending limits, must meet public subsidy eligibility requirements and must have raised twice the minimum match otherwise required. *See* Minn. Stat. § 10A.25 subd. 13.[4] The Plaintiffs allege no facts to attempt to show that any candidate whom they oppose has met these requirements or is likely to meet these requirements. Absent such allegations, even Plaintiffs' argument that their independent expenditures will result in public subsidies for their opponents is unsupported speculation.

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[4] Similarly, the increased expenditure ceiling provided by Minn. Stat. § 10A.25 subd. 13(a) applies only to those candidates who have voluntarily accepted the expenditure limits in the first instance *and* whose major party opponent also agrees to be bound by the voluntary limits. *See* Minn. Stat. § 10A.25 subd. 10 (Supp. 1993). Plaintiffs have not alleged facts to suggest that candidates they support and candidates they oppose in the same race will likely agree to be subject to the voluntary spending limits.

Assuming *arguendo* that candidates against whom Plaintiffs make independent expenditures will be eligible for an increased expenditure ceiling or increased public subsidy or both, Plaintiffs still have not demonstrated that any increased funding provided to an opposing candidate would constitute an unconstitutional infringement of their rights guaranteed by the First Amendment. The independent expenditures law imposes no limit on the amount a person or entity may spend and does not otherwise constrain Plaintiffs' exercise of protected speech rights. It merely provides that, under some conditions, the opposing candidate may be entitled to spend additional amounts on his own campaign message and that he may be entitled to an additional public subsidy. Assuming the subsidy is content-neutral, a government's decision to subsidize only certain speech does not abridge the First Amendment rights of those who do not receive the subsidy. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546 (1983); *see Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

Plaintiffs' contention that the independent expenditure law infringes their First Amendment rights and therefore may cause them irreparable injury is intertwined with the underlying merits of the claim, discussed in greater detail *infra* at II.A. Based on that discussion and the foregoing analysis, the Court concludes that the mere possibility that another person's political speech may be advanced or subsidized as an indirect result of the Plaintiffs unfettered exercise of their First Amendment rights does not constitute a threat of irreparable harm.

Plaintiffs also contend that failure to enjoin enforcement of the independent expenditures law poses a threat of irreparable harm because they are unable to determine what the statute requires of them and failure to comply with the law is punishable by criminal penalty. The Court addresses the merits of this "void-for-vagueness" claim *infra* at II.A.2. and preliminarily finds the statute is likely not unconstitutionally vague. Reasonable people can determine what is required of them by the independent expenditures statute and they are not unfairly exposed to threat of criminal sanction without prior warning of what they must do to comply with the law. Therefore, the criminal sanctions provision of the independent expenditures law does not pose a threat of irreparable harm to the Plaintiffs.

B. $100 Contribution Limit

Plaintiff MCCLCSPC argues that the $100 contribution limit poses a threat of irreparable harm because the limit will prevent Plaintiff from raising sufficient funds to fully advance its political ideals. This argument is unpersuasive. Unlike the plaintiffs in *Elrod*, MCCLCSPC cannot argue that it would be completely silenced by the contribution limit. In the most recent election cycle, three-fourths of the Plaintiffs' total receipts came from contributions of less than $100. Plaintiffs have presented no facts or evidence to suggest that they would be unable to collect an amount equal to the remaining one-fourth (26%) through greater numbers of contributions under $100. In any event, "the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages" which may be afforded by freedom of

speech. *Regan v. Taxation with Representation*, 461 U.S. at 550 (1983).

Nearly two decades ago, the Supreme Court established that the First Amendment permits government limits on political contributions. *See Buckley v. Valeo*, 424 U.S. 1 (1976). In partial support of its finding that contribution limits do not offend the First Amendment, the Court stated:

> The overall effect of the . . . contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression . . .

Id. at 21-22. In a recent case challenging the same statute, this Court held that a political committee which raised 29% of its funds from contributions exceeding $100 failed to demonstrate that the $100 contribution limit posed a threat of irreparable harm. *See* Memorandum Opinion and Order, *Minnesotans for Term Limits et. al. v. Hayes*, Civ. Nos. 4-93-766 & 4-93-805 (D. Minn. Nov. 24, 1993) (Murphy, J.). Similarly, Plaintiffs in the case at bar have failed to demonstrate that the mere possibility that they may be unable to raise the level of funds they desire in the coming election cycle constitutes a threat of irreparable harm.

II. Probability of Success on the Merits[5]

A. Independent Expenditures Provisions

1. Restriction or Burden on Free Speech

The Plaintiffs contend that the independent expenditures statute is unconstitutional because it burdens their exercise of free speech rights. In support of this contention, Plaintiffs argue that, through the statute's subsidy and increased expenditure provisions, the Government forces Plaintiffs to subsidize the speech of a candidate they oppose as the price of independent expenditures in favor of a candidate they support. *See* Minn. Stat. § 10A.25 subd. 13 (Supp. 1993). Stated differently, Plaintiffs believe they are faced with a choice "between not speaking or subsidizing the campaign coffers of the candidate being opposed" and argue that difficult choice impermissibly burdens their exercise of free speech rights.[6]

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[5] Plaintiff Steve Frazier challenges Minn. Stat. § 10A.25 subd. 13, alleging that it infringes his First Amendment rights by effectively compelling him to contribute his tax dollars to a candidate he opposes. Because it is unlikely that Frazier could satisfy the strict and narrow requirements for taxpayer standing, *see ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989); *Frothingham v. Mellon*, 262 U.S. 447 (1923), and thus his likelihood of success on the merits is extremely low, the Court will not discuss his challenge further in ruling on these preliminary injunction motions.

[6] Initially, as discussed *supra* at I.A, Plaintiffs have failed to allege any facts which tend to show that any candidate they oppose will be *eligible* to receive an independent expenditure subsidy or that a candidate(s) they oppose will accept the voluntary spending limits in the first place. The Court will assume,

Plaintiffs' argument that if they decide to make independent expenditures they will be forced to subsidize the speech of their opponents misperceives the nature of the subsidy provided by the statute. Unlike the governmental regulations struck down in *Miami Herald* and *Pacific Gas & Electric*, which forced private entities to fund the speech of their opponents directly through expenditure of their own private funds, the present statute provides for a *public* subsidy to opponents of candidates supported by the Plaintiffs. *See Pacific Gas & Electric v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The Supreme Court made it clear in *Pacific Gas* that content-neutral, public subsidies of political speech are permissible. *Pacific Gas*, 475 U.S. at 14-15. The flaw in the government regulation of speech in *Pacific Gas* was that it

> identifie[d] a favored speaker based on the identity of the interests that [the speaker] may represent . . . and force[d] the speaker's opponent – not the taxpaying public – to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of the disfavored speaker.

Id. at 15 (citations omitted). The present statute is content neutral. Any subsidy or increase in expenditure limits is

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for purposes of this discussion at the preliminary injunction stage, that Plaintiffs may eventually be able to show that some candidates they oppose will be eligible for additional public subsidies or subject to the expenditure ceilings. This allows Plaintiffs to clear the threshold requirement that the expenditure ceilings and public subsidy provisions are implicated.

triggered solely by the event of an independent expenditure, regardless of the interest of the speaker or the content of the speaker's message. Further, the entity making the independent expenditure is not forced to expend its own resources to facilitate the expression of an opposing viewpoint.

Contrary to the arguments of the Plaintiffs, the law imposes no restrictions on their ability to make independent expenditures. Plaintiffs are free to make as many independent expenditures as they desire without restraint, censure or penalty by the Government. The independent expenditures law imposes no significant restriction on the Plaintiffs' speech.[7] Instead, the law merely provides that, in certain limited circumstances, independent expenditures may trigger an opportunity for an opponent to respond using public funds, additional private funds or both.

Plaintiffs' contention that the public subsidy provision unfairly advantages the opposing candidate or constitutes an improper use of public funds is equally unavailing. The government has no obligation to subsidize all speech equally. *See Regan v. Taxation with Representation of Washington*, 461 U.S. at 546-47. In the present case, in furtherance of what it believes is the public interest, the Government has simply chosen to subsidize the speech of candidates against whom independent

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[7] Plaintiffs do not argue that the independent expenditure reporting requirements would impose a heavy or costly administrative burden which would chill their exercise of their First Amendment rights. *Cf. Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1396-97 (1990).

expenditures are made while refusing to subsidize the speech of persons and entities which make independent expenditures. Because the subsidies are content-neutral and not "aimed at the suppression of dangerous ideas," they do not run afoul of the guarantees of the First Amendment. *Id.* at 550.

The independent reporting and subsidy provisions of the statute may make the Plaintiffs' strategic decisions regarding independent expenditures and weighing their possible consequences more difficult. However, the First Amendment does not guarantee the Plaintiffs freedom from difficult choices. A government regulation which forces a civic organization to make a difficult choice with respect to the exercise of constitutional rights does not, without more, violate the organization's First Amendment rights. *See Brookins v. O'Bannon*, 699 F.2d 648 (3d Cir. 1983). Here, though the independent expenditures statute may, in some circumstances, create a dilemma for the Plaintiffs, they have not demonstrated a likelihood that such a dilemma would impermissibly restrict their First Amendment rights.

Because the independent expenditure provisions facilitate more speech in some circumstances, they may actually advance core values underlying the First Amendment. A primary purpose of the First Amendment is "to secure the widest possible dissemination of information from diverse and antagonistic sources." *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *see Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969). To the extent that the statute provides for increased debate about issues of public concern raised by an independent expenditure, it actually promotes the free

and open debate the First Amendment seeks to foster and protect. The Court concludes that the Plaintiffs have demonstrated little likelihood of success on their claim that the independent expenditures provisions of the statute constitute an unconstitutional burden on free speech.

2. Vagueness and Overbreadth Challenges

Plaintiffs also contend that the independent expenditures notice provisions should be declared void for vagueness. Due process requires that a law whose violation is punishable by criminal penalty must state clearly what conduct it requires or prohibits. *Kolender v. Lawson,* 461 U.S. 352 (1983). A penal statute which fails to define the criminal offense clearly in terms understandable by ordinary people, is "void-for-vagueness" because it violates constitutional due process requirements. *Id.* at 357. The vagueness doctrine and underlying due process concerns are implicated here because the independent expenditures notice statute provides that failure to comply with the requirements of the statute is punishable as a gross misdemeanor. *See* Minn. Stat. § 10A.20 subd. 6b(b).

The independent expenditures notice provision essentially provides the mechanism through which the Ethical Practices Board (Board) would determine when a candidate – who meets all the other necessary preconditions – is eligible for additional public or private funding on the basis of an independent expenditure made on behalf of his or her opponent. For purposes of the vagueness dispute, the notice obligation is set forth in the following section:

> Subd. 6b. Independent expenditures; notice. (a) Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of $100, other than an expenditure by an association targeted to inform solely its own dues-paying members of the association's position on a candidate, the individual, political committee, or political fund shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy of the affidavit on each candidate in the affected race and on the treasurer of the candidate's principal campaign committee. The affidavit must contain the information with respect to the expenditure that is required to be reported under subdivision 3, paragraph (g); except that if an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.
>
> (b) An individual or the treasurer of a political committee or political fund who fails to give notice as required by this subdivision, or who files a false affidavit of notice, is guilty of a gross misdemeanor and is subject to a civil fine of up to four times the amount of the independent expenditure stated in the notice or of which notice was required, whichever is greater.

Minn. Stat. § 10A.20 subd. 6(b) (Supp. 1993) (emphasis added).

Plaintiffs assert that the phrase "becomes obligated by written or oral agreement to make an independent expenditure" is so indefinite that they are unable to

determine their reporting obligations under the statute. They argue that the nature of independent political expenditures and the imprecision of the term "obligated" make it impossible to determine when they are required to report the independent expenditures to the Board. Thus, they conclude, they are subject to risk of penal sanction without adequate notice of what is necessary to conform their conduct to the requirements of the statute.

The Plaintiffs' vagueness challenge to the independent expenditures reporting procedure appears, at this early stage, to present a somewhat closer question than their challenges to the more substantive provisions of the law. The language of the independent expenditure reporting requirements might have been written more clearly or with greater precision. However, whether this Court or the Plaintiffs might have written the statute differently is not the standard which guides the Court's review. The proper inquiry is whether the language of statute as enacted is sufficiently definite to allow ordinary citizens to understand what is required of them and to discourage arbitrary and discriminatory enforcement. *See Kolender,* 461 U.S. at 357. After preliminary review, the Court concludes that, under the due process analysis articulated in *Kolender* and its antecedents, Plaintiffs do not have a substantial probability of success on the merits of the vagueness challenge.

The existence of a legal obligation is readily determined by common experience and the application of well-established principles of contract law and related

equitable principles.[8] Whether an obligation exists between a person or entity making an independent expenditure and the provider of a good or service in exchange for the expenditure does not require speculation or more sophistication or experience than that of an ordinary consumer – either a person is legally obligated to make an expenditure or she is not.[9]

Political funds and committees like MCCLCSPC and IMPACE-MEA have a higher degree of sophistication and

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[8] It reasonable to assume the statute refers to a legal obligation, because the State is without authority to determine the existence of a moral obligation or to attempt to enforce any variety of obligation not grounded in statutory or common law. The Court also notes that none of the Plaintiffs suggests that the alternative event triggering a reporting obligation, the actual *making* of an independent expenditure, should be held void for vagueness.

[9] The individual Plaintiffs do not allege their right to make independent expenditures directly in their capacity as individuals is infringed by the reporting requirement or that the reporting requirement as applied to individuals should be held void for vagueness. It is not clear that the individual Plaintiffs have alleged sufficient facts to confer standing to make such a challenge. However, even if such a challenge were appropriately presented in this action, the Court doubts the individual Plaintiffs could prevail. In the course of day-to-day life, people enter various transactions and oral and written agreements creating binding obligations. The conduct of commerce depends on ordinary consumers and merchants understanding the nature of obligations – including obligations to make expenditures – and how and when those obligations arise. Although possibly somewhat less sophisticated than a political fund or organization, a person of ordinary experience understands when she is legally "obligated." Therefore, the language of the statute is likely not impermissibly vague on its face, even with respect to its application to individuals.

experience in matters of political expenditures and obligations than the ordinary person. In light of that experience, their contention that they would be unable to determine whether or when they become obligated to make an expenditure lacks credibility. Certainly the public media and vendors of other goods and services related to political communications would be unwilling to provide such services if they believed that purchasers of those goods and services would seriously contend they were unable to determine if they had incurred an obligation to pay for those services. The creation of a binding obligation provides a clear line of demarcation between negotiations and discussions regarding independent expenditures, which entities have no duty to report and the conclusive decision to make an independent expenditure, which they must report. If, for example, a political committee contemplates an independent expenditure and discusses the *possibility* of making such an expenditure with a vendor, but enters no binding agreement, the committee is not *obligated* to make such an expenditure and, under the terms of the statute, the reporting requirement is not triggered.

Several of the Plaintiffs' vagueness agruments fail to distinguish between the *timing* of the creation of an obligation and the objective existence of an obligation. The Court understands that the nature of political campaigns in general and particularly independent expenditures makes the timing of decisions regarding the creation of obligations to make such expenditures unpredictable and uncertain. In some cases, the creation of the obligation to make an expenditure and the actual expenditure may occur nearly simultaneously. Further, for a variety of

reasons, a person or entity may plan to make an independent expenditure and later decide not to make the expenditure. However, the timing of the ultimate decision regarding an independent expenditure does not determine whether an entity is obligated to make such an expenditure. Similarly, if an entity enters a binding obligation to make an independent expenditure and later for its own reasons decides not to publish (in the broad sense) the good or service procured by the expenditure, the obligation still exists.

The existence of an obligation is not vague or indeterminate. People of ordinary experience and intelligence understand when they have entered an obligation; a law imposing reporting requirements on those who enter independent expenditure obligations does not require them to guess at its meaning or expose them to the risk of penalty without fair warning. *See Id.; Rowan v. United States Post Office Dept.*, 397 U.S 728, 740 (1970). Accordingly, Plaintiffs are not likely to succeed in their vagueness challenge to the independent expenditure reporting requirements of the statute.[10]

In a related objection, Plaintiffs contend that the reporting obligation may require them to report *obligations* to make expenditures which are not ultimately

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[10] Defendants also contend that the Board's authority to issue advisory opinions on the requirements of the law effectively eliminates any vagueness concern. *See* Minn. Stat. § 10A.02 subd. 12 (1992). The Court is unaware of any authority holding that otherwise unconstitutionally vague statutory language may be cured by the existence of an administrative or adjudicative panel empowered to interpret the law and issue advisory opinions regarding its interpretation.

translated into published political speech in favor of a candidate. The Court interprets this complaint to state a modified "overbreadth" argument, which also incorporates other objections previously discussed. The Plaintiffs essentially argue that due to their failure to translate obligations to speech, their political opponents may be aided by an additional government subsidy when the candidate they support has received no benefit from the expenditure or obligation. This, they apparently conclude, constitutes an overbroad regulation of their political speech because is subsidizes their opponent and effectively penalizes them for speech they did not make. The Supreme Court has emphasized the limited application of the overbreadth doctrine, stating "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep" *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The Plaintiffs' hybrid argument fails for a least two reasons. Initially, the court previously concluded that the independent expenditures provisions do not burden the Plaintiffs' exercise of rights guaranteed by the First Amendment. The reporting requirement does not restrict Plaintiffs' freedom to make independent expenditures – they remain free to make or not make whatever expenditures they wish. Plaintiffs offer no argument to suggest that the law would burden the exercise of First Amendment rights of others not before the Court. Because neither the Plaintiffs nor any other citizen's First Amendment rights are burdened by the reporting requirement, overbreadth analysis is not appropriate.

Second, as previously discussed, the Government has no obligation to subsidize various types of expression equally, as long as the subsidy scheme is content-neutral. *See Regan v. Taxation with Representation,* 461 U.S. 540 (1988); *Pacific Gas & Electric v. Public Utilities Comm'n of California,* 475 U.S. 1, 15-16 (1986). The fact that the triggering event for government subsidy of a candidate's campaign expression may or may not correlate with an actual expenditure in support of that candidate's opponent is not relevant to the principles expressed in *Regan* and its progeny. Plaintiffs have little likelihood of success on their claim that the independent expenditures provisions of the statute are overbroad.

B. $100 Contribution Limit

Plaintiffs also contend that the $100 contribution limit unconstitutionally infringes their right of free association guaranteed by the First Amendment. The Court agrees that the contribution limit imposes at least some restriction on freedom of association. However, under the analysis set forth in *Buckley,* even a significant government interference with rights of political association may be sustained if it is justified by an important government interest and if it employs means narrowly drawn to avoid needless infringement of associational freedoms. *Buckley v. Valeo,* 424 U.S. at 25-26 (1976). The Supreme Court extended the rule announced in *Buckley* to multicandidate political committees like Plaintiff MCCLCSPC in *California Med. Ass'n v. Federal Elec. Comm'n,* 453 U.S. 182 (1981). The government regulations approved in *Buckley* and *California Med. Ass'n* were political contribution ceilings very

similar in design and intent to the limit imposed by Minn. Stat. § 10A.27 subd. 12.

As in *Buckley*, a primary concern of the Minnesota Legislature in enacting this statute was prevention of the appearance and reality of corruption of the political process through the exercise of undue and improper influence by persons and entities making large financial contributions. The legislative history suggests that the Legislature also intended the contribution limit to restore and maintain citizens' confidence in their government and elected officials. "Preserving the integrity of the electoral process [and] preventing corruption . . . are interests of the highest importance. Preservation of the individual citizen's confidence in government is equally important." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (citations omitted). The State will likely be able to show that the contribution limit is supported by compelling government interests.

Plaintiffs argue that the contribution limit is not narrowly tailored to avoid unnecessary infringement of associational freedoms. They contend that the $100 limit is so low that it unnecessarily limits the rights of citizens to engage in legitimate expressive political activity and abridges their rights of association. The Supreme Court addressed a similar objection in *Buckley* and held that, as long as a reviewing court is satisfied that some limit on contributions is necessary, it need not attempt to determine the precise amount which will effectuate the government's important interest. *Buckley*, 424 U.S. at 30. In this context, such differences in degree of regulation are significant only if they amount to differences in kind. *Id.* Plaintiffs have failed to proffer any argument which

would suggest that the $100 contribution limit is so low as to constitute a difference in kind.

This Court recently upheld the same contribution limit against a similar preliminary challenge by a multicandidate political committee. *See* Memorandum Opinion and Order, *Minnesotans for Term Limits et. al. v. Hayes,* Civ. Nos. 4-93-766 & 4-93-805 (D. Minn. Nov. 24, 1993) (J. Murphy). In that case, Judge Murphy applied the teaching of *Buckley* and its progeny and found that, as applied to a political committee which supported a number of candidates (plaintiff Republican Victory Club), the $100 limit likely complies with the requirements of the First Amendment. *Id.* Finding neither a threat of irreparable harm nor sufficient likelihood of success on the merits, the Court denied the multicandidate political committee's motion for preliminary injunction.[11] Judge Murphy's

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[11] In the same consolidated case, Judge Murphy enjoined enforcement of the $100 contribution limit with respect to plaintiff Minnesotans for Term Limits (MTL). However unlike the Plaintiffs in the present case, MTL does not make expenditures or contributions in support of any candidate or otherwise advocate the election or defeat of any candidate. It exists solely to advocate the imposition of limits on the term in office of all elected officials. With respect to such an entity, it is far less certain that the government has a sufficiently important interest to justify the restriction of associational freedom imposed by a contribution ceiling. *See Buckley,* 424 U.S. 1 (1976); *Minnesotans for Term Limits et. al. v. Hayes,* Civ. Nos. 4-93-766 & 4-93-805 (D. Minn. Nov. 24, 1993). The Plaintiffs in the instant case admittedly advocate the election or defeat of numerous candidates, partly through the expenditure of funds. Therefore, while Plaintiffs' claim is closely analogous to that of the multicandidate political committee Republican Victory Club, it is plainly distinguished from that of the MTL in *Minnesotans for Term Limits v. Hayes.*

well-reasoned analysis in that case applies with equal force to the Plaintiffs' challenge to the same contribution ceiling in the instant case.

The $100 contribution limit imposed by statute in Minnesota appears constitutional. This conclusion is buttressed by a recent opinion issued by this Court involving the same statute and nearly identical issues. Therefore, the Court concludes that Plaintiffs' likelihood of success on the merits of their constitutional challenge to the contribution ceiling is fairly low. Similarly, as discussed above, the Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their challenge to the independent expenditures provisions of the Minnesota campaign finance statute.

III. Public Interest and Balance of the Harms

The remaining two factors do not strongly favor either side. The public interest is strongly implicated by this suit. The First Amendment rights asserted by Plaintiffs are among the most important rights guaranteed by the United States Constitution and the exercise of those rights is critical to an informed electorate and a healthy democracy. The public also has strong interests in eliminating the appearance of and potential for corruption in the democratic process, encouraging citizens' confidence in their government and in implementing laws enacted by the Legislature.

Plaintiffs will suffer injury to their First Amendment interests if the state is allowed to enforce a statute which is later found to impermissibly infringe their First Amendment rights. However, if the Court enjoins

enforcement of the campaign law, the Government will suffer injury to its sovereign interests, to its interest in implementing laws enacted by the Legislature, and to the interests of combatting [sic] both corruption of the political process and erosion of public confidence in the government. The positions of both sides implicate significant public interests and the balance of the harms favors neither party.

CONCLUSION

The Plaintiffs have failed to demonstrate they face a threat of irreparable harm if the Court does not issue an injunction. The Plaintiffs also have not demonstrated a substantial likelihood of success on the merits of their challenges to the Minnesota campaign finance statute. The balance of the harms and the public interest favor neither side. Consideration of the four factors together compels the conclusion that Plaintiffs have failed to demonstrate that preliminary injunctive relief is appropriate. Accordingly, Plaintiffs' motions for preliminary injunctions will be denied.

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. The motion of the Plaintiffs in Civil File No. 3-93-857 (Clerk Doc. No. 2) seeking to enjoin enforcement of Minn. Stat. §§ 10A.20 subd. 6b & 10A.25 subd. 13 (Supp. 1993) is DENIED; and

2. The motion of the Plaintiffs in Civil File No. 3-93-876 (Clerk Doc. No. 2) seeking to enjoin enforcement

of Minn. Stat. §§ 10A.20 subd. 6b, 10A.25 subd. 13 & 10A.27 subd. 12 (Supp. 1993) is DENIED.

Dated: January 5, 1993.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District
Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Scott Day, Treasurer of IMPACE-MEA, a Political Fund, et al.,

Plaintiffs,

vs.

Vanne Owens Hayes, in her capacity as Chair of the Ethical practices Board, or her successor,

Defendant.

Court File No. 3-93-857

Minnesota Citizens Concerned for Life, et al.,

Plaintiffs,

vs.

Vanne Owens Hayes, in her capacity as Chair of the Ethical Practices Board, et al.,

Defendants.

Court File No. 4-93-1213

AFFIDAVIT OF NANCY L. HELMICH

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

NANCY L. HELMICH, being first duly sworn upon oath, deposes and says as follows:

1. I am a legal assistant in the Minnesota Attorney General's Office.

2. At the request of Jocelyn F. Olson, Assistant Attorney General, I reviewed the portions of the legislative history of H.F. 163, S.F. 152 and H.F. 201, which were considered by the Legislature during the 1993 session.

3. I obtained official minutes of committee meetings and listened to tape recordings of committee meetings. I taped portions of the committee hearings relevant to H.F. 163 and S.F. 152 and asked secretaries in our office to transcribe the tapes. I then reviewed the transcripts as I listened to the tapes.

4. Attached to this affidavit are transcripts of the following:

Exhibit A: Excerpt from Senate Ethics and Campaign Reform Committee Meeting of Tuesday, February 2, 1993.

Exhibit B: Excerpt from the tape of the General Legislation, Veterans Affairs and Elections Committee of the House from February 15, 1993.

These transcripts are true and correct to the best of my knowledge.

/s/ Nancy L. Helmich
NANCY L. HELMICH

Subscribed and sworn to before me
this 28th day of December, 1993.

/s/ Deborah D. Jones
Notary Public

[SEAL]

Exhibit A

A PORTION OF THE SENATE ETHICS AND CAMPAIGN REFORM COMMITTEE MEETING FROM TUESDAY, FEBRUARY 2, 1993

Senator William Luther ("**Sen. L**") is introducing Senate File No. 152. Also speaking will be Joan Higinbotham ("**J.H.**"), Executive Director, Common Cause-Minnesota.

Sen. L: . . . Members, its a privilege for me to come before you to present Senate File No. 152, which is otherwise known as the Common Cause Proposal. But just to give you a little background, Common Cause brought together a task force dealing with these ahh, the issue of campaign finance reform. Early last summer and ahh, in the entire interim, one break that we got from our campaigns this year was those monthly meetings or whatever it was that we participated in on this task force. It was a bipartisan task force and it consisted of members of the Democratic Party, members of the Republican

Party, members of Common Cause, League of Women Voters, representation from the Ethical Practices Board, and just ahh, I think everyone who participated agreed that it was one of those task forces where it seemed like every point of view was represented. And I'm pleased to say that the product before you is a result of a consensus that was developed among those members of the task force. To my recollection, never once was a vote, a specific vote taken. It was the recommendations; the recommendations consisted of a consensus that was reached among the members as to the ways in which we could improve the political process in the State of Minnesota. And the goals didn't seem to be goals that we disagreed on. It was just a general feeling that we wanted, ahh, the goals, quite frankly were very similar to the ones that you advanced, Mr. Chairman, at our earlier meeting. You know, races where there'd be more of an opportunity for challengers to take on incumbents; whether it be less of what we'd term "special interest" money, where there'd be more reliance on small amounts of money from large numbers of people. And, ahh, I think with those goals in mind, we're pleased to say that we came up with a number of, I think, just excellent recommendations and they're contained in this bill.

Before going through the bill, and I'll do that, I'll proceed through the bill, I'd like to call on Joan Higinbotham from common Cause to make some preliminary remarks.

Chair: Thank you. Welcome to the Committee, Ms. Higinbotham.

J.H.: Thank you, Mr. Chair. Members of the Committee. I'm happy to come here today to talk about the campaign finance proposal that was put together by the task force from Common Cause. Senator Luther will take us through the bill section by section. I would just like to provide a little background and some context for the work that went into the proposal.

The genesis for this legislation is one of the factors that I think make it a strong and valid approach to reforming a system of financing political campaigns. As Senator Luther said, the task force was convened by Common Cause in May of 1992. One of the primary criteria was that everybody had to have a different point of view, it seemed. And the people who were involved shared one thing. They had all been involved in campaign finances in some way; some had been candidates, campaign managers, members of watch-dog groups, members of the legislature, party officials, and so on. So it was, indeed, a very broad-based group. We had members of the Ethical Practices Board, staff from the Ethical Practices Board, and so on. Many of those people are with us today and they would also be happy to answer questions that, if any should arise during the, during the hearing.

Joan Higinbotham (continuing):

The group brought a lot of different philosophies and many different perspectives to their tasks. I think, as Senator Luther said, one thing that was interesting was that everybody was very frank and honest and open and not everybody agreed all the time. There was a lot of disagreement. But the one thing that I, who

came into the process in the middle, was very interested in, was the fact that diverse people can come together and can agree on one final proposal which is what we have here. I think that one of the things that's important to remember is that this group of people looked at things from a very pragmatic point. They wanted something that was reasonable; something that could be passed; something that would be workable for both volunteer treasurers and candidates as well. So it is a compromise package, and I think one thing also to remember is that probably nobody enthusiastically supports every bit of it. But in the view of the group, it's going to close some major loopholes that are now present and it will create a level playing field for both challengers and incumbents. And it has a broad base of support from those outside who observe the system and from the candidates within the system.

The task force, first of all, looked at certain goals and underlying values that they had for the kind of campaign finance reform system they wanted to see. And they used these goals and values as a yardstick against which they measured the desirability of the proposals of the reforms that they proposed. And the goals and objectives and values, I think, are important to look at, because it was not only the means that they were looking at, it was the ends that they wanted that were important. They wanted to enhance the public's confidence in the political process and in public officials. They wanted to encourage a broader public participation in the electoral process. They hoped to remove barriers to candidacy by qualified challengers. They wanted to simplify the system. They

wanted to bring about a more open, accountable, responsive political process. They wanted to increase the substantive quality of the elections. They wanted to decrease the influence of money while increasing the influence of merit. The task force worked through the critical issues. Members were always mindful that whenever changes would be made at point in the system, it would result in new problems at other points in the system.

It reminds me somewhat of the old Rubik's cube. After you get all the faces on one side carefully aligned, you'd look around and see that the other side is completely out of alignment. We feel that this proposal has done a long was [sic] to solving the riddle of the Rubik's cube of political reform. For this reason, we'd like to see it go forward intact. We believe that moving and rearranging the various parts may result in a mismatched proposal with some negative and unintended consequences.

Joan Higinbotham (continuing):

This bill makes comprehensive, necessary changes in campaign finance law. It has broad, bipartisan support and I think the members of the task force agree that it will go a long way toward restoring public confidence in the political process and inferring[word?] an equal opportunity for all candidates, both challengers and incumbents.

Chair: Thank you. Are there questions for Ms. Higinbotham?

Chair: If not, thank you very much.

J.H.: Thank you.

[Short side conversation.]

Sen. L: Before I proceed then, I certainly would ask any other member from the task force that would like to make a statement, that certainly, I'd welcome it. I do see a number of members of our task force that are here today, and I really simply can't do enough to commend the effort that they put in. It's just outstanding. Many, many meetings and lots of hard work, and they're all important, busy people, so it was very good hardworking group, and I appreciate it.

Sen. L: With that then, Mr. Chairman, what I'd like to do is just proceed through the bill and I take it the one that everyone has is the one that has eleven. . . .

Chair: Senator Luther, the one that we have in the packets is 93-1133.

Sen. L: Then I'll just proceed through the bill so that members will understand the provisions. I'll try to go quickly, but I'd certainly be glad to answer any questions along the way.

Section one of the bill defines election. . . .

. . . .

Section fourteen. A section that would limit the amount, the size of the contribution to a PAC. This would prevent a few folks, a very small group of folks from getting together and just saying, hey, let's have a PAC and let's give, you know, kind of as a front for us, and let's get it, ahh, give a lot of money to it and have the PAC make contributions. This would limit any contribution to a PAC to $200.00 and again, I think that's a major reform. I'm sure there are PACs today that get contributions well in excess of

$200.00, so this would require again, large numbers of people making small contributions.

Exhibit B

AN EXCERPT FROM THE TAPE OF THE GENERAL LEGISLATION, VETERANS AFFAIRS AND ELECTIONS COMMITTEE OF THE HOUSE FROM FEBRUARY 15, 1993

Joan Higinbotham ("J.H.)" and Tom Berg ("T.B.") from Common Cause are discussing their task force report on campaign reform and the proposed legislation in House File No. 163.

Chair: . . . so at this time then, we'd ask Tom and Joan to come forward, please. Welcome to the committee. I understand taht [sic] you have been working hard and long on this.

J.H. Mr. Chairman and members of your committee. My name is Joan Higinbotham and I'm the Executive Director of Common Cause-Minnesota and I'm happy to have the opportunity to come here today to talk about our campaign finance reform proposal. You'll have an opportunity to go over the specifics of the bill in a while. I'd just like to provide a little background and context for how this came about.

The genesis of this legislation, I think, is really one of the factors that make it a strong and a valid approach to reforming the political campaign finance system. In May of 1992, Common Cause put together a task force of people who were involved in some way with campaign

finance. It was a diverse group of people with members from both political parties, legislators, staff and board members of the Ethical Practices Board, lobbyists, representatives from the citizens' group, the League of Women Voters, and Joint Religious Legislative Coalition and other groups. So it really had representation from people who were running for office and were in the legislature and people who watch-dogged those groups. The group did bring a lot of different perspectives to the process and a lot of different philosophies.

One thing that I thought was interesting, and I came into it when we were half-finished, was the fact that people with very different philosophies could talk frankly and honestly about how they felt about these issues, say what they thought wouldn't work and what would work, and come up with a compromise that everyone agreed with. Because it's a compromise, I don't think anybody loves every bit of it. They're not completely enthusiastic about all the provisions but in the view of ___, it will close some of the major loopholes that we now have and it will create a level playing field for challengers as well as for incumbents, which is one of the things that we were looking at. It also has a broad base of support from all those groups who were involved in the task force. It's a bill that they've all agreed to and that they can all get behind and support.

Joan Higinbotham (continuing):

When the task force was working, they started out by looking at certain goals and values for the system of campaign finance they wanted to see. And they used these as sort of a yardstick

to measure what they did. In other words, they didn't start out by making the changes; they started out by looking at what kind of ends they wanted to have. And they decided what they wanted to see. And the things they were concerned about were first of all, enhancing the public's confidence in the political process and in public officials. They wanted to encourage broader participation in the whole electoral process. They wanted to take away some of the barriers that qualified challengers saw when they thought about whether or not they should run for office. And they wanted to simplify the system of running for office. They wanted to bring about also a more open, a more accountable, and a more responsive process. They wanted to increase the substantive quality of the elections and I think another important thing, they wanted to decrease the influence of money and they wanted to increase the influence of merit in campaigns.

And as they went through the critical issues that were involved, they were always thinking about whenever you make a change at one point in the system, there might be new problems at another point in the system, and I think that that's something they were very concerned about. And the example that I like to think about is that Rubik's cube that we used to use when we were kids and we'd get one side all lined up and we'd look at the other side and it was all out of alignment. And that's something that could happen with the campaign funding process as well. So we think that in this process we've looked at it very carefully from all sides and put together a package that is fair to incumbents and challengers and that has a lot of key

elements that are sort of closely interlocked. If you change one, you may have unintended consequences along the way. That's why we would like to see the bill go forward in tact, because we think that if you rearrange and change, you do get the unintended consequences.

The task force, I think, feels very strongly that this bill does make some comprehensive, some necessary changes in the campaign finance law. It does have sound, strong, bipartisan support and we think that it will go a long way toward restoring public confidence in the political process and also ensuring equal opportunities for everyone who runs for office.

Joan Higinbotham (continuing):

As I said, it was a task force that was broadly based. We were happy to have one of our members, Tom Berg, who was sitting on the other side of the table some years ago, when he was the first, when he was the author of the first comprehensive campaign finance reform bill. And he is going to talk to you a little more about the specifics of what happened in the process, and what we bring before you today.

T.B.: Thank you, Joan. I guess I get, maybe, a chance to correct what we did back in 1974, because as Joan said, I was the chief author of that legislation back in 1974 that provided for the first time, the system of public financing; major emphasis on public disclosure as a way to police what's going on in the election process and we created the Ethical Practices Board. Since then, a lot has happened, obviously. As a result, the task force was put together that Joan Higinbotham mentioned. And the groups that

have been involved in that, at least some of the groups, were the League of Women Voters, Common Cause that Joan represents, the Joint Religious Legislative Coalition and the Citizens League. In addition, Todd Otis was there, DFL state party chair; Representative Pawlenty was involved; I think Representative Lasley stopped by at one of the meetings; Senator Laidig was involved; Senator Luther; just a variety of people from both political parties, worked very hard on this for about six months. Meeting in the morning early, trying to hammer out a realistic bill. I think we have done so.

The purpose of the legislation is really quite simple. It is to make our democracy work better; that's really what it comes down to. And if we do that, I think voter confidence in the system, in the electoral system is going to even go up. I think voter confidence in you as legislators will go up, and in the legislation that you pass will go up. And that is really the purpose that we try to keep in mind as we went forward. I think the election process is similar to the judicial process in the sense that perception is very important; perception of fairness and improperness, and I think we've tried to accomplish that in this legislation.

In 1974 when we passed this, it was right after Watergate, and the voters were very much demanding some change and we provided it. Since that time, in my view, I think unfortunately in some sense, direct participation of politics has gone down. I think the caucus attendance is down; the amount people checking off is down in the check-off system; and direct giving to campaigns I think is down. But I'm a

believer at least that people still care about Minnesota and the country and the electoral process. And in part of that, they have gone to PACs to express how they care. And that, there's good PACs and bad PACs and we tried to avoid that because that depends on your perspective; what's a good one and what's a bad one. But people do care and they give a lot of money through PACs to causes for children, for the environment, for both sides of the abortion question, for business and labor, and so on and so forth. But that's what I think has happened in the last eighteen years or so – there's been a decrease in direct participation and kind of an increase in the more indirect participation through PACs.

Tom Berg (continuing):

I think right now, Mr. Chairman and members of the committee, that you have voters in a mood not dissimilar from what happened after Watergate and that there's very close scrutiny as you probably know better than anybody else, whether it's trips to Duluth or ski trips or how campaigns are funded, the voters are looking at things pretty close and are demanding changes in the status quo. I think that's part of the explanation for Ross Perot getting 24% of the vote here in the State of Minnesota. So I think that all of you need to act this session; I think the Governor needs to sign the bill this session; I think the voters are demanding it. And what we have done here is try to design a bill that fills the bill here and fits this need. We have done this by trying to encourage more citizen direct involvement in the process through a system of matching funds in terms of payment for

campaigns. We have reduced, substantially, the impact of special interest money or PAC money in that the amount of money that a PAC can give to a campaign has been reduced dramatically. In addition, we've put an aggregate limit on as to how much can come into campaigns from PACs, lobbyists, and big givers, to try and get a handle on that and reduce the impact of that.

We have also tried to level the playing field between challengers and incumbents in that a challenger can get to, can spend 10% more than an incumbent. I realize the difficulty of that for all of you – that you're incumbents – but at one point in time we were all challengers and I think and the thinking of the task force was that that is a fair provision. We retained very major support for the concepts that were the hallmark of the legislation that we passed back in '74, i.e., public disclosure and limits. And those things are very important. And we recommend significant funding for the Ethical Practices Board to try to help make all of this work in a good and proper manner. We believe we have done this in a manner consistent with the Constitution and with the realities of a DFL-controlled legislature and a republican governor. We have been in touch with the Governor's office trying to keep them informed and work with them on the legislation, because it isn't going to do anybody any good to get into, in my view, into a partisan fight over this and get something passed and then get it vetoed. I don't think the voters are going to want that to happen. I know there probably will be a few partisan, unless it's changed a lot since when I was over here, there may be a few partisan battles along the way

because we had them when we passed it in '74. But we managed to kind of keep it all going together and get it passed, and I hope that you can do that this session.

I think there are still a number of people in our society and certainly everybody on that task force, who believe that serving as a legislator is very important business; its' tough and hard work, and that campaigns do help educate the electorate, and we want to assist you in trying to pass this legislation. As Joan mentioned, we want to try to hold this bill together. There are some delicate compromises in this. Again, all these people were volunteers, worked over six months, some strong arguments, a few laughs in the process, but we came up with what I think is a pretty good bill. And again, I would suggest from the history that I have learned, that it's important to try to work together and to try to hold the bill together in a package.

Tom Berg (continuing):

Let me just mention a couple of the concepts here and then I know that Representative Sparby will take you through it. We prohibit the "friends of" committees and that they have to be dissolved, is one of the things that's in the bill. I mentioned the increase in spending for challengers. We tried to think through carefully in this bill how it really works in the real world and a number of folks on the task force have been involved in campaigns, both state-wide and legislative races, and so we've tried to come through with a realistic bill. And on that expenditure limit for challengers, for example, it's for a challenger who has not run previously for any

other office whose territory now includes a population that is more than one-third of the population in the territory of the new office, to try to preclude the situation where some very popular local official who has got a great big base in a legislator's district, can go out and have that base and still go on to spend another 10%. That would not be fair to all, to the incumbents. And that, I just cite that as an example of the kind of thing we tried to balance and think through to be fair to the various interests that get involved in this whole area.

We restricted the use of carry-forward contributions. One of the other things that we did here was we allowed there to be a PAC, a PAC can be set up by a corporation – they can't use any corporate money for it obviously – but they can at least have a PAC; we clarified that part of the law. They can advance some money to set up and create a PAC, but then they have to pay it back out of the money they receive from the PAC. In other words, the individuals then contribute to the PAC and that money's got to go off the top to pay for those administrative costs. But it clarifies the fact that there can be PACs there.

Tom Berg (continuing):

The other, oh, there's a variety of things in the legislation, but I think I'll just stop there, and Representative Sparby will cover that, and we're certainly available to answer questions or try to help you now, or anywhere through the process. We have, this task force and the groups involved, are very much committed to getting something passed here, so there will be lobbying assistance available and to do what we think

is appropriate, and hopefully you'll view it as assistance, and not anything otherwise, because we want to get a bill passed and we think we've got a good bill that fits what I think the people of Minnesota want and should have.

Chair: OK, thank you for the presentation.

[END OF TRANSCRIPTION HERE.]

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In the

Supreme Court of the United States

October Term, 1994

JOHN L. HOLAHAN, JR., in his official capacity as Chair of the Minnesota Ethical Practices Board; HUBERT H. HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,
Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA; et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether a statutory scheme, triggered by political speech in the form of an independent expenditure by a citizen(s), which (1) increases the expenditure limits for a candidate by the sum of the independent expenditures made in opposition to the candidate and/or the independent expenditures made on behalf of the candidate's major political party opponents and (2) requires the payment of a public subsidy to the same candidate(s) in an amount equal to one-half of the independent expenditures, violates the citizen's rights to free speech, belief, association and equal protection guaranteed under the First and Fourteenth Amendments to the United States Constitution?

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STATEMENT OF THE CASE

Petitioners correctly state that this is a case involving a First Amendment challenge to certain statutes that relate to the making of independent expenditures. The statutes at issue provide certain candidates for office in the State of Minnesota with money subsidies and increased expenditure limits under a campaign financing scheme. These subsidies and increased expenditure limits are triggered by the making of political speech in the form of an independent expenditure of over $100 by a citizen or citizens. If eligible, candidates who are not the beneficiary of an independent expenditure receive a money subsidy equal to one-half the amount of the expenditure and have their spending limits increased dollar for dollar. There are certain requirements that must be met before a candidate is eligible for the benefits.

Legislative History

The legislative history cited by Petitioners misleads the court in several respects. The goals of the task force and the purported subsequent goals of the legislation cited by Petitioners are taken from testimony given at a time when the bills did not contain the independent expenditure provisions in question. The independent expenditure provisions were added by amendment at a later date, but were not included in the bill as originally passed. The Governor of Minnesota vetoed the original bill and stated that he would only sign the legislation if it contained the independent expenditure provisions challenged here.

The legislative history record is extensive in this case. In sum, the appropriate history reveals that the chief author of the bill in the senate was well aware that the provisions would result in the chilling of independent expenditures. Further, the record in this case is unrefuted that this intended effect became

reality as it pertains to Respondents. Until the restrictions were lifted by the Eighth Circuit, Respondents refrained from independently speaking through independent expenditures in the elections held to that date.

Petitioners' description of who is eligible and how the candidate becomes eligible is similarly misleading. Initially, Petitioners correctly inform the Court that "the public subsidy provision of subdivision 13(c) applies only if the opposed candidate is bound by the spending limits, is eligible to receive a public subsidy, and has raised twice the minimum match required by Minn. Stat. § 10A.323." Pet. Brief at 11. Petitioners then go on to profess that the Eighth Circuit erred in stating that the independent expenditure provisions appear to be incapable of being carried out in either the primary or general election. However, it was Petitioners who took the position before the Eighth Circuit that the provisions could not be in effect for the primary elections because a candidate must win the primary to be eligible for a public subsidy. The Eighth Circuit then correctly concluded that should Petitioners' view be correct, a candidate would also be ineligible for an independent expenditure subsidy in the general election (because the candidate had to obtain a certain percentage of the votes in order to be eligible for a subsidy in the general election).

Decision of the Eighth Circuit

The Eighth Circuit found the independent expenditure provisions violate the First Amendment on its face. In its analysis, the Court held that the scheme directly impaired the free speech rights of Respondents.

> Thus the individual or group intending to contribute to her defeat becomes directly responsible for adding to her campaign coffers. To the extent that a

> candidate's campaign is enhanced by the operation of the statute, the political speech of the individual or group who made the independent expenditure "against" her (or in favor of her opponent) is impaired.

Pet. App. at A8.

The Court's review of the case record disclosed the unrefuted fact that the statutes had caused Respondents to refrain from speaking in the first place and that the legislative history established this result as the intention of the legislation as well. The Court held that under these facts, the public subsidy and increased spending limits were "a direct result of that independent expenditure", and that it "chills the free exercise of that protected speech." Id. at A9.

The Court also held that the highest level of judicial scrutiny would be applied to the statutes because they are not content-neutral. Id. at A10.

Finally, the Court passed on the issue of whether Petitioners' proffered compelling interest was sufficient to overcome the free speech interest. It held that the facts of this case lead to the conclusion that Petitioners had no legitimate interest in enacting the legislation in question. The Court pointed to the record, which established that participation in public financing was near 100% before the enactments and that Petitioners had not established the need for the remedial legislation. The Court concluded that "[o]ne hardly could be faulted for concluding that this 'compelling' state interest was contrived for purposes of this litigation." Id. at A12.

SUMMARY OF ARGUMENTS

The Court should not accept this case for review for the following reasons:

1. This case is of limited value to the nation because the decision of the Eighth Circuit Court of Appeals turns only on the unique facts of the case. Petitioners' proffered compelling governmental interest here is "the maintenance of a high participation rate in the public campaign financing statutory scheme [which] is directly related to the State's compelling interest in preventing corruption or the appearance of corruption." Pet. Brief at 27. The Eighth Circuit did not decide whether this interest was sufficiently compelling because "with candidate participation in public campaign financing nearing 100% before enactment of section 10A.25 subd. 13, the interest, no matter how compelling in the abstract, is not legitimate." Pet. App. at A11 (emphasis in original). Thus, the case turns on its unique facts and will be of little value to other jurisdictions.

2. The second unique aspect of this case concerns the legislative history of the enactments. The Court noted that the Chair "of the Senate Ethics and Campaign Reform Committee and chief author of the senate bill, explained to the Senate Committee on Finance how the legislation would prevent or dramatically limit independent expenditures." Id. at n. 4. This legislative history is unique to this case and is unlikely to be relevant in another case.

3. The decision of the Eighth Circuit is consistent with past decisions of this Court and other appellate Courts. The decision is consistent with the long line of cases under the unconstitutional conditions doctrine. The statutory scheme in question conditions the expenditure of public funds on whether or not a citizen exercises First Amendment rights,

thereby imposing an unconstitutional condition on that exercise.

The Court found that the record established that the scheme chilled the free exercise of speech. This Court determined in Buckley v. Valeo, 424 U.S. 1 (1976) that political speech in the form of independent expenditures is to be afforded the broadest protection under the First Amendment and that there is no compelling interest that would justify such a chilling.

The present decision correctly holds that the scheme in question had the purpose and effect of deterring speech. This deterrent effect infringes the exercise of free speech under Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) and Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986).

Finally, the Eighth Circuit held that the facts of this case lead to the inescapable conclusion that the professed interest in inducing candidates to opt into public financing was not legitimate. It did not decide whether the interest, in the abstract, would be sufficiently compelling.

Petitioners' basis for asking the Court to exercise its plenary powers rests on their belief that the decision of the Eighth Circuit is incorrect. They cannot, and did not, point to a conflict with a decision of this Court or any other appellate court on the same matter. To the extent that this is a case of first impression, the case largely turns on the unique factual background of the circumstances in Minnesota and would be of little value to the rest of the nation.

REASONS TO DENY REVIEW

The Holding of the Eighth Circuit is Fact-specific.

Petitioners rely heavily in their petition on the compelling nature of the State's interest in enacting the statutes at issue. The Eighth Circuit specifically did not decide this issue in its decision. "[W]e hold that, with candidate participation in public campaign financing nearing 100% before enactment of section 10A.25 subd. 13, the interest, no matter how compelling in the abstract, is not legitimate." Pet. App. at A11 (emphasis in original). The Court's rationale for its decision is grounded on the principle that the government, in order to sustain a compelling interest in remedial legislation, must have a basis in fact or some historical basis. In this case, the record unequivocally shows that candidate participation in public financing was near 100% and that there was no showing by the state that the professed interest was real or legitimate.

The Court further noted:

> [T]o the extent that the state's brief can be read as arguing that the level of candidate participation in publicly financed campaigns may be eroded in the absence of these limitations on the speech and association rights of those who wish to make independent expenditures, the argument lacks factual support and must be regarded as wholly speculative.

Id. at A12, n. 6.

The discussion of this factual background constitutes a lengthy portion of the decision of the Eighth Circuit. Finally, citing the factual background, the Court concluded that the record in this case would not even satisfy even the most cursory scrutiny. This unique fact basis for the decision

militates against this Court granting plenary review because it would not be applicable to other jurisdictions.

The Unique Legislative History of This Case Diminishes its Use in Other Jurisdictions

This case is factually unique in another significant way. The legislative history of the enactments clearly shows that the intention of the statutes was to prevent the making of independent expenditures in the first place. The legislative history record in this case is long, complete, and unwavering. The purpose of this legislation was to deter citizens from speaking and the authors of the legislation intended it to have that effect.

Citing the full legislative history on these enactments would take an entire volume. Suffice it to say that it clearly shows that the authors of the statutes intended them to deter speech makers from speaking at all. As a representative example, the chief author of the legislation responded to a concern from another Senator over the use public money for this purpose when it could be used for better purposes, such as public education, by stating that money would not be wasted because citizens or groups of citizens would respond to this legislation by not making more independent speeches about candidates:

> * * * if I have a more powerful arsenal, namely money, handed to me to counter what that independent expenditure is going to be, the people making the independent expenditure are going to say forget it, I'm not going to try because I'm going to be out-gunned right away. And you're saying well, let's just forget about that part. They're going to just decide to do this without looking at what the other side is going to do. The other side has full

opportunity to respond to that. And that's why they're not going to do it.

Hearing on H.F. 163, Sen. Comm. on Finance (April 17, 1993) (Excerpt taken from transcriptions in record below).

The original bill that passed the legislature did not contain the independent expenditure provisions challenged here. The Governor vetoed the bill and declared that he would not sign any bill unless it contained the independent expenditure provisions. In special session, the legislature finally passed the law with the provisions in question.

Petitioners are incorrect in their citation of legislative intent. They cited citizen members of a task force on campaign finance reform. Under well settled principles of Minnesota law, the only comments that are relevant and afforded weight in evincing legislative intent are the comments of the author of the bill. See Handle With Care, Inc. v. Department of Human Services, 406 N.W.2d 518 (Minn. 1987); McKee-Johnson v. Johnson, 444 N.W.2d 259 (Minn. 1989). This rule is followed by the federal courts when evincing Congressional intent as well. See Woodworking Manufacturers Ass'n v. National Labor Relations Board, 386 U.S. 612, 640 (1967); Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

The relevant portions of the legislative history clearly indicate that the chief author of the bill intended this statutory scheme to chill the exercise of free speech rights of certain citizens. This legislative history is unique to the circumstances of the facts of this case, would have little significance to circumstances elsewhere, and argues against this Court granting plenary review.

The Decision of the Eighth Circuit is Consistent with Past Decisions of the Supreme Court and Other Appellate Courts.

The decision is consistent with the unconstitutional conditions doctrine.

Petitioners misstate the issue when they ask the Court to review this case because it is inconsistent with other decisions of this Court and others "concerning the issue of whether laws that confer benefits on one person violate another person's free speech rights." Pet. Brief at 17. That is not at issue in this case.

This statutory scheme confers benefits or burdens on a citizen conditioned on whether the citizen exercises her right to free speech. Therefore, the scheme directly contravenes the long line of cases establishing the unconstitutional conditions doctrine. The decision of the Eighth Circuit is entirely consistent with this legal doctrine.

This Court first established this doctrine in Speiser v. Randall, 357 U.S. 513 (1958), in which it invalidated a statute that conditioned a property tax exemption on the taking of a loyalty oath. This doctrine is especially important in the area of First Amendment rights. In a later case, this Court determined that the government "may not deny a benefit to a person on a basis that infringes * * * constitutionally protected interests-especially * * * freedom of speech." Perry v. Sindermann, 408 U.S. 593, 597 (1972). Finally, this doctrine is grounded on the Court's belief that it does not want to "allow the government to 'produce a result which [it] could not command directly.'" Id. at 597, quoting Speiser, 357 U.S. at 526.

Petitioners miss the point when they state that the Court of Appeals ruled that laws that confer benefits on one person violate another person's free speech rights. The real issue is

whether laws that confer benefits or burdens on someone are conditioned on the exercise of a person's free speech rights. Seen in that proper light, the decision of the Eighth Circuit is entirely consistent with past decisions of this Court and other circuits.

The Eighth Circuit decision is consistent with past decisions of this Court regarding independent expenditures.

This Court has held that independent expenditures are pure political speech which are to be afforded the "broadest protection" and that they are in "an area of the most fundamental First Amendment activities." Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam). The Eighth Circuit had little difficulty in determining that the statutory scheme burdened free speech. "It is equally clear that [the statutory scheme] infringes on that protected speech because of the chilling effect the statute has on the political speech of the person or group making the independent expenditure." Pet. App. at A9. The Court relied upon the record and the legislative history as evidence of the chilling effect and intention.

Contrary to Petitioners' assertion , this Court has found "that the government violates someone's free speech rights by assisting another in responding to that speech." Pet. Brief at 23. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), this Court invalidated a Florida statute that required newspapers to provide space for candidates to reply to negative editorials. It found the scheme imposed a penalty on the newspaper for its speech and also held that it unconstitutionally blunted public debate by potentially deterring the newspaper from speaking in the first place.

In Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986), this Court relied on Miami

Herald to invalidate an attempt to force the utility to distribute its opponents' literature along with its own billing materials. The Court found the regulation unconstitutional because, like the statute invalidated in Miami Herald, its "effect was to deter [speakers] from speaking out in the first instance." Pacific Gas & Electric, 475 U.S. at 10.

Thus, Petitioners' assertion that the statutory scheme in question does not limit the right of citizens to speak misses the point. As this Court noted in Miami Herald, the "argument that the Florida statute does not amount to a restriction of appellant's right to speak because the 'statute in question here has not prevented the *Miami Herald* from saying anything it wished' begs the core question." Miami Herald, 418 U.S. at 256 (footnote omitted).

Petitioners have not offered a sufficiently compelling governmental interest.

This Court in Buckley discussed three possible governmental interests that might justify a chilling of free speech.

1. Preventing corruption or the appearance of corruption.

2. Muting the voices of affluent groups or individuals and thereby equalizing the ability of persons to speak and affect the outcome of an election.

3. Halting the mushrooming costs of election campaigns and thereby allowing more candidates the opportunity to run or election. See Buckley, 424 U.S. at 25-26.

This Court held that the second and third interests were not sufficient to overcome constitutional objections. Further, the first interest was not sufficient to overcome burdening free speech in the form of independent expenditures, because independent speech is not tainted by the same notions of corruption as are direct contributions. Id. at 47. Petitioners'

professed interest in inducing candidates to opt into public financing is nothing more than a reiterated refinement of the interests found unworthy in Buckley.

Moreover, as noted earlier, the Eighth Circuit deliberately did not decide whether this professed interest was sufficiently compelling. It held that the government's interest in this case was not legitimate because of the facts in this record. It held that the record showed that there was no need for the government to add inducements for candidates to opt into public financing because candidate participation was near 100%.

Finally, the statute must not only serve a compelling governmental interest, it must be narrowly tailored to meet that interest. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 665 (1990). The Eighth Circuit did not have to reach this matter because it held that the interest was not legitimate. However, this Court should note that Petitioners will fail on the other prong as well. There is nothing in the statute that requires the candidate who receives the money subsidy to spend it on "countering" the citizen speech. Thus, not only is the statute not narrowly tailored, it belies Petitioners' assertion that it is needed to further public debate or to induce candidates to opt into public financing.

Petitioners' reasons for granting certiorari are not sound.

At base, Petitioners are asking the Supreme Court to grant plenary review simply because they disagree with the decision of the Eighth Circuit. Disagreement with a decision is not a proper basis to seek review on Writ of Certiorari under Rule 10 of the Supreme Court Rules. For instance, Petitioners have not, and cannot, articulate where the decision is in conflict with a decision of this Court or any other appellate court on the same matter. To the extent that this matter is a unique case, it is unique because of its record,

including the legislative history and the record of candidate participation in public financing in Minnesota.

The only importance that Petitioners have placed on this case is its potential use regarding bills that might possibly pass the United States Congress at some future date. In this regard, Petitioners are asking the Court to hear this case to provide prospective relief so that the legislative branch of government could be guided in its future conduct. Respondents submit that this is also an improper reason for granting certiorari.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the petition for a writ of certiorari in this matter.

Respectfully submitted,

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In The

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October Term, 1994

JOHN L. HOLAHAN, JR., in his capacity as Chair of the Minnesota Ethical Practices Board; HUBERT HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,

Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA; *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MITCHELL HOYT UNRUH AND LORI ERICKSON

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QUESTION PRESENTED FOR REVIEW

1. Does a state campaign financing statute which both suppresses the independent expenditure levels of certain candidates and denies them public subsidies, while it increases the independent expenditure levels of their political opponents and provides their opponents with public subsidies, violate the First and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

Respondents Mitchell Hoyt Unruh and Lori Erickson agree with Petitioners Holahan and Humphrey's (hereafter "the State") "List Of Parties" set forth in their petition for *writ of certiorari,* except, however, that these Respondents believe that Respondent Minnesota Citizens Concerned for Life (MCCL), a non-profit corporation organized under Minnesota law and an appellant in Case Number 94-2388, does not have an interest in this petition because the statutes in question affect its political action committee, Minnesota Citizens Concerned for Life for State Pro-Life Candidates (MCCLCSPC) (represented by separate counsel for purposes of this petition), rather than itself.

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No. 94-983

In The

Supreme Court of the United States

October Term, 1994

JOHN L. HOLAHAN, JR., in his capacity as Chair of the Minnesota Ethical Practices Board; HUBERT HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,

Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA; *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MITCHELL HOYT UNRUH AND LORI ERICKSON

The Respondents respectfully request that this Court deny a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on September 1, 1994.

STATEMENT OF THE CASE

This case concerns First and Fourteenth Amendment challenges to a Minnesota campaign finance statute which restricts independent expenditures (as well as a

companion statute which concerns the reporting requirements for independent expenditures). As will be discussed, when independent expenditures are made, this statute penalizes persons, political action committees (PAC's) and certain candidates by restricting these candidates' expenditure limits and by denying them public subsidies, while it increases the expenditure limits of their opponents and provides their opponents with public subsidies.

I. BACKGROUND OF THE CASE

On May 15, 1993, the Minnesota Legislature amended the Ethics and Campaign Acts with Laws 1993, Chapter 318. These amendments regulate campaigns for statewide and legislative office and, *inter alia*, regulate expenditures by individuals, corporations, and political committees in connection with such elections. The amendments became effective May 21, 1993.

On December 20, 1993, this action was commenced by MCCL, Eileen Angell – a member of MCCL and a contributor to its political action committee – and MCCLCSPC. On December 30, 1993, the complaint was amended by adding Respondents Unruh and Erickson, both of whom are candidates for the state legislature.

Lori Erickson is a resident of Minnesota. She ran for election to the Minnesota State Senate in 1990 and in 1992. She intends to run for election to the state senate in 1996.

Mitchell Hoyt Unruh is a resident of the State of Minnesota. At the time of this complaint, Mr. Unruh intended to run for election to the Minnesota House of Representatives in 1994. In his 1994 campaign, he

intended to be bound by the expenditure limits imposed by the state's public financing scheme.

II. THE OPERATION OF THE STATUTES AT ISSUE.

The Ethics Act, as amended, provides that the expenditure limits of a candidate against whom an independent expenditure is made "are increased by the sum of independent expenditures made in opposition to [such] a candidate plus independent expenditures made on behalf of the candidate's major political party opponents. . . . " Minn. Stat. § 10A.25, subd. 13(a).[1] It also provides that "within three days after providing [the] notice [required by Minn. Stat. § 10A.25, subd. 13(b)], the board shall pay each candidate against whom the independent expenditures have been made . . . an additional public subsidy equal to one-half the independent expenditures." Minn. Stat. § 10A.25, subd. 13(c).

Thus, under Minn. Stat. § 10A.25, subd. 13(a), when someone makes, or becomes obligated to make, an independent expenditure in support of a candidate, the state increases the expenditure limit of the candidate's political opponent while restricting the candidate's expenditure limit. Moreover, under Minn. Stat. § 10A.25, subds. 13(a) and (c), when someone makes, or becomes obligated to make, an independent expenditure in opposition to the candidate's political opponent, the state increases the

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[1] Similarly, the Ethics Act, as amended, provides that a candidate's expenditure limits "are increased by the sum of independent expenditures made in opposition to [such] a candidate plus independent expenditures made on behalf of the candidate's major political party opponents . . . " if its opponent has an independent expenditure made on its behalf. Minn. Stat. § 10A.25 subd. 13(a).

expenditure limit of the candidate's political opponent (*see* Minn. Stat. § 10A.25, subd. 13(a)) *and* gives the opponent an out right monetary subsidy (*see* Minn. Stat. § 10A.25, subd. 13(c)) while restricting the candidate's expenditure limit and denying the candidate a public subsidy.

The effect of Minn. Stat. § 10A.25, subd. 13, is to penalize the free speech rights of persons, not-for-profit corporations, and PAC's that make independent expenditures by providing benefits to the candidates they oppose as a direct result of their political activities. Furthermore, the effect of the statute is to penalize the free speech and equal protection rights of candidates who are having independent expenditures made in their favor by suppressing their expenditure limits relative to those of their opponents and to penalize the free speech and equal protection rights of candidates whose opponents are having independent expenditures made against them by suppressing their expenditure limits relative to those of their opponents and by denying these candidates public subsidies.

Respondents Unruh and Erickson brought suit against the Ethics Act as amended, Minn. Stat. § 10A.25, subd. 13, on the ground that by suppressing their expenditure limits relative to that of their political opponents, and by providing their opponents with public subsidies while denying such subsidies to them, the statute infringed upon their First Amendment rights. They also challenged this provision on the ground that by treating them differently than their political opponents in this

manner, the statute violated their rights to the equal protection of the laws.[2]

III. THE DECISIONS OF THE LOWER COURTS

After the district court denied the Respondents' motion to preliminarily enjoin Minn. Stat. § 10A.25, subd. 13, they moved for summary judgment regarding, *inter alia*, the constitutionality of this provision. For the reasons set forth in the State's petition (*see* Petition at 14-15), the district court denied that part of the Respondents' motion concerning Minn. Stat. § 10A.25, subd. 13. The Respondents subsequently appealed this decision.

The United States Court of Appeals for the Eighth Circuit reversed the ruling of the district court pertaining to Minn. Stat. § 10A.25, subd. 13. The court reiterated the pronouncements of this Court that independent expenditures, as a form of political speech, are entitled to "the broadest protection." App. at A9. Yet the operation of Minn. Stat. § 10A.25, subd. 13 infringes upon this form of protected speech by chilling the willingness of persons to make independent expenditures. *Id.* The court thus implicitly found that the statute penalizes the exercise of political speech.

The court's finding was based upon the fact that under the statute, a person, such as Ms. Schweitz, intending to make an independent expenditure to *defeat* a candidate will, instead, "becom[e] directly responsible for

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[2] Respondent Schweitz, represented by separate counsel for purposes of this petition, brought suit against Minn. Stat. § 10A.25, subd. 13 on the ground that it infringed upon her First Amendment rights by penalizing her making of independent expenditures.

adding to her campaign coffers." *Id.* at A8. Thus, "[t]o the extent that [the] candidate's campaign is enhanced by the operation of the statute, the political speech of the individual . . . who made the independent expenditure against the candidate" is impaired. *Id.* The court noted that "[t]he knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy . . . as a direct result of that independent expenditure, chills the free exercise of that protected speech," and amounts to "self-censorship." *Id.* at A9.

The Eighth Circuit stated that the district court took too narrow of a view of whether the statute was content-based. *Id.* at A7. It observed that because the statute only singles out a particular type of speech – "that which advocates the election or defeat of a candidate and/or supports the election of her opponent" – this infringement is content-based. *Id.* at A10.

Next, the court found that because participation in the financing scheme – the purported governmental interest behind the statute – was almost "100% *before* enactment of [§] 10A.25, subd. 13," the asserted interest was not even legitimate, let alone compelling. *Id.* at A11 (emphasis in original). In fact, the court intimated that this alleged interest was probably "contrived for purposes of this litigation." *Id.* at A12.

Finally, given the extremely high participation rate of candidates in the public financing scheme before the enactment of § 10A.25, subd. 13, the court stated that this infringement on First Amendment rights could hardly be viewed as "narrowly tailored." *Id.* The court noted that, for example, only three percent of all candidates declined

to participate in the public financing scheme in the year previous to the statute's passage. "[S]urely," the court reasoned, "the three percent of non-participants could be brought [into the scheme] by means less burdensome to constitutional rights – assuming that group can be brought in at all." *Id.* Accordingly, the court held the statute unconstitutional.[3]

Next, the Court of Appeals invalidated Minn. Stat. § 10A.20, subd. 6b. It noted that this section "is directed exclusively to independent expenditures, clearly for the purpose of implementing subdivision 13 of section 10A.25." *Id.* at A15. "With section 10A.25 subd. 13 declared unconstitutional," the court declared that "the state cannot convincingly show a substantial relation between the information sought [by the reporting requirements of Minn. Stat. § 10A.20, subd. 6b] and a subject of overriding and compelling state interest." *Id.* It thus held that § 10A.20, subd. 6b is not severable from

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[3] The court observed that even if the statute were viewed as being content-neutral, it would not pass constitutional muster. Specifically, it stated that regardless of whether the purported interest was "substantial, [§] 10A.25, subd. 13 cannot logically be characterized as 'essential' to furthering [this alleged] interest." *Id.* at A13. Given that "no more than an additional three percent of all candidates could be brought into the public campaign financing scheme," the court noted that "the statute's negative impact on political speech must be in violation of the First Amendment rights of those who wish to make the independent expenditures at issue." *Id.* at A13-A14. In short, the court stated that "[t]he statute's burden on First Amendment rights does not satisfy strict, intermediate, or even the most cursory scrutiny." *Id.* at A14.

§ 10A.25 subd. 13 and struck down this provision as well.[4] *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

This case does not simply involve the State choosing to provide benefits to certain candidates, as the Petitioners allege. Rather, it concerns the State penalizing persons who engage in protected political speech, thereby infringing upon their First Amendment rights. In this regard, the decision of the Court of Appeals is in harmony with similar decisions by her sister circuits and is mandated by the precedents of this Court.

Furthermore, even if the analysis employed by the Eighth Circuit is incorrect, there are alternate grounds for invalidating Minn. Stat. § 10A.25 subd. 13 as violating the First and Fourteenth Amendment rights of candidates. These alternate grounds demonstrate that the Court of Appeals correctly struck down this provision. Given this correct result, this Court should not hear this case simply to render what in effect would amount to an advisory opinion on election law.

Finally, this case involves the straightforward application of basic principles of constitutional law. Because there is no conflict with either this Court or with other

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[4] The Eighth Circuit also noted that "[t]he Minnesota campaign ethics law provides detailed requirements for the reporting of campaign expenditures, including independent expenditures apart from those found in section 10A.20 subd. 6b." *Id.* at A14. "Therefore," the court observed, "even if section 10A.25 subd. 13 were constitutionally sound," "the requirements of section 10A.20 subd. 6b may be redundant in serving any legitimate purpose and thus constitutionally burdensome." *Id.*

circuits on these principles, this Court should devote its valuable resources to cases of greater import to the nation and deny the petition.

I. THE DECISION OF THE COURT OF APPEALS ON THE RESPONDENT SCHWEITZ'S FIRST AMENDMENT CLAIMS IS IN HARMONY WITH PRIOR DECISIONS OF THIS COURT AND WITH SIMILAR DECISIONS OF HER SISTER CIRCUITS.

In its petition, the State portrays this case as a situation where the government is merely providing candidates with a benefit – something, it argues, it is clearly allowed to do. [Petition at 17]. However, as discussed *supra*, and as the Court of Appeals perceptively observed, this case really involves the government *penalizing* the exercise of protected political speech by providing benefits to only certain classes of candidates and only in direct response to certain protected political activities. This penalty infringes upon core First Amendment values, and because it is content-based, necessitates applying the most exacting scrutiny – scrutiny which it does not pass.

The State relies upon the opinion of the district court for the proposition that § 10A.25 subd. 13 does not impose a penalty upon anyone. *Id.* It notes the court stated that the statute does not (formally) "restrict anyone from making independent expenditures"; it does not (formally) "dictate the content of the messages communicated by those making such expenditures"; and it does not (formally) "force individuals or associations to fund the expression of viewpoints they oppose." *Id.* This simplistic analysis by the State is an example of form over substance.

The flaw in the State's argument is apparent by examining its intent in enacting this provision, as well as the statute's effect upon the making of independent expenditures. If one makes the most cursory examination of the statute's operation and looks beyond the thinly shrouded veil of apparent "neutrality," it is evident that § 10A.25 subd. 13 was intentionally enacted to penalize the exercise of only certain types of political speech and unfortunately has had precisely that effect. In this fashion, the State is attempting to do indirectly what it clearly is prohibited from doing directly: penalizing the making of independent expenditures.

In *Buckley v. Valeo,* this Court noted that limitations on independent expenditures "operate in an area of the most fundamental First Amendment activities." 424 U.S. 1, 14 (1976). It observed that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of [our] system of government," and therefore, "[t]he First Amendment affords the broadest protection to such political expression . . . " *Id.* It thus concluded that expenditure limitations "impose direct and substantial restraints on the quantity of political speech." *Id.* at 39.

This Court rejected the governmental interests that were advanced in support of these limitations: 1) maximizing the effectiveness of other statutory provisions; *Id.* at 44[5] 2) preventing corruption and the appearance of corruption; *Id.* at 45, and 3) equalizing the relative ability

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[5] This Court stated that "[t]he markedly greater burden on basic freedoms caused by [the statute] . . . cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Id.*

of individuals and groups to influence the outcome of elections. *Id.* at 48.[6] Accordingly, this Court announced that "[w]hile the independent expenditure ceiling fails to serve any substantial governmental interest . . . it heavily burdens core First Amendment expression." *Id.* at 47-48. It then proclaimed that restrictions on independent expenditures were unconstitutional under the First Amendment. *Id.* at 51.

Under *Buckley* then, it is clear the government cannot constitutionally limit the making of independent expenditures for any of the aforementioned reasons. Yet this is precisely what the State in this case has surreptitiously attempted to do. Specifically, the State knew it could not directly prohibit the making of independent expenditures in order to advance the above-stated interests. Therefore, it enacted § 10A.25 subd. 13 to *indirectly* prohibit (or at least effectively prevent) their making in order to further these interests. The Court of Appeals expressly recognized this illicit motive in its opinion. It noted that an important "sponsor of the legislation *intended*" to limit the making of independent expenditures. App. at A9.[7]

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[6] This Court stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.*

[7] The Eighth Circuit observed that "senator John Marty, then chairman of the Senate Ethics and Campaign Reform Committee and chief author of the senate bill, explained to the Senate Committee on Finance how the legislation would prevent or dramatically limit independent expenditures, a goal that he recognized could not be accomplished directly because it would violate the First Amendment." *Id.* at n.4.

This was done, presumably, to advance its three interests behind the statute: 1) to increase the effectiveness of the statutory scheme; (Petition at 14: "to preserve the viability of the voluntary spending limit program,"); 2) "to limit the potential for corruption or the appearance of corruption;" *Id.* at 6, and; 3) to equalize the ability of persons and groups to influence the political process, i.e., to equalize speech. (*Id.* at 5: "[t]hey also hoped to decrease the influence of money.") Under *Buckley*, these interests are constitutionally insufficient to justify the limitations on the making of independent expenditures that § 10A.25 subd. 13 has effectively imposed.

By examining the particular context or scenario in which the statute will operate, it is apparent that the statute has had the effect of penalizing, and thereby limiting, the making of independent expenditures. The statute does not operate in a vacuum. It does not simply provide benefits to only certain candidates based upon legitimate criteria with no repercussions to persons besides the candidates themselves.

Rather, the State, through Minn. Stat. § 10A.25 subd. 13, will only confer benefits to particular candidates if its citizens engage in a certain type of political speech. The crux of the matter is that the benefit the State will provide is the exact opposite result of what the "expenders" desire in terms of their purpose in exercising their First Amendment rights.

The statute will come into play only if the person makes an independent expenditure in favor of a candidate who that person supports or if he or she makes an expenditure against a candidate who that person opposes. Thus, if a person supports candidate A and opposes candidate B, and the person exercises its right to

free speech by making an independent expenditure *in support* of **candidate A**, § 10A.25 subd. 13 will, as a direct result of this expenditure, increase only the expenditure limits of candidate B – the candidate who the person opposes – while suppressing the expenditure limits of candidate A – the candidate who the person supports.

Moreover, if the person exercises their right to free speech by making an independent expenditure *against* **candidate B** – the candidate who it opposes – § 10A.25 subd. 13 will, as a direct result of this expenditure, increase only the expenditure limits of candidate B, while it suppresses the expenditure limits of candidate A – the candidate who it supports; **and** it will, as a direct result of this expenditure, provide only candidate B with a public subsidy, while it denies candidate A such a subsidy.

In other words, the statute will, as a **direct result** of a person exercising their right to engage in protected political speech, provide benefits to the candidate, *and only to the candidate,* who the person opposes. In this way, the State is sending an unmistakable message to its citizens: if you exercise your right to engage in protected political speech by opposing (or supporting) particular candidates, we will **penalize** you by instead providing subsidies only to those candidates who you oppose, **and** we will suppress the expenditure limits (relative to those of their opponents) of only those candidates who you support.

Because persons naturally do not want to harm those candidates who they support, or aid those candidates who they oppose – and § 10A.25 subd. 13 penalizes them for making independent expenditures in precisely this fashion – they will refrain from speaking at all. The statute is thereby chilling their willingness to speak on

matters of public concern.[8] Such a result is squarely at odds with the purpose of the First Amendment.

The purpose of the First Amendment is to further our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), and thereby "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957). Yet for the aforementioned reasons, § 10A.25 subd. 13 perverts this important purpose by penalizing, and consequently deterring or "chilling," the exercise of protected political speech. In this fashion, it is infringing upon First Amendment rights.

In sum, the Eighth Circuit correctly found that the statute **penalizes,** and thereby infringes upon, First Amendment rights. Thus, *as a group*, the "benefit" cases the Petitioners rely upon to demonstrate an alleged conflict between the Eighth Circuit and her sister circuits, and between the Eighth Circuit and this Court, are unpersuasive. In some, each of these cases is factually distinguishable from the instant case.

Initially, the Petitioners assert that the findings of the Eighth Circuit are at odds with the pronouncements of this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). Specifically, they note that in *Buckley*, this Court "upheld a

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[8] As the Court of Appeals has observed, this chilling effect on First Amendment rights is, unfortunately, already occurring. *See* App. at A9: "the mere enactment of section 10A.25 subd. 13 already has prevented many if not most potential independent expenditures from ever being made."

statute which provided federal funds for presidential candidates who entered primary campaigns, but did not provide funds for candidates who did not run in party primaries." [Petition at 18]. Therefore, the Petitioners imply, because this Court in *Buckley* upheld the ability of Congress to provide funds to only certain candidates, the Eighth Circuit erred in finding that the State of Minnesota could not do likewise in this case.

The problem with this analysis is that in *Buckley*, Congress *was* simply providing benefits to candidates. It was not seeking to utilize these benefits to *penalize* persons for exercising their First Amendment rights. In other words, unlike the instant case, Congress did not provide federal funds to only certain candidates and only in direct response to another person (or PAC) exercising their right to engage in protected political speech; further, it did not provide funds only to those candidates who the persons engaging in protected political speech opposed. In other words, Congress did not provide funds to candidates with the intent and effect of penalizing, and thereby chilling, free speech.

In short, *Buckley* involved the provision of benefits, not the imposition of penalties. It is thus easily distinguishable from the instant case. The decision of the Court of Appeals was consistent with the teachings of this Court.

Next, the Petitioners cite *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), where this Court upheld two aspects of the "fairness doctrine" requiring a broadcaster to provide broadcast time to respond to personal attacks. The petitioners claim that in that case, the Supreme Court approved the provision of benefits "in response to another's exercise of

protected speech." Petition at 19. However, in the case at bar, the State is providing more than simply an "opportunity to respond." Rather, it is penalizing its citizens for engaging in protected political speech. *Red Lion* is thus also factually distinguishable from the case at bar.

The remainder of the cases the Petitioners cite to demonstrate that the decision of the Eighth Circuit conflicts with similar decisions by other circuits and with the decisions of this Court are similarly distinguishable. These cases involve situations where the government is legitimately providing a benefit, as opposed to the situation which exists in the instant case: where the government is providing a benefit as a pretense to penalize, and thereby deter, the exercise of free speech.[9]

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[9] The Petitioners assert that the "fundamental flaw" in the Court of Appeals' decision was "its conclusion that a state cannot confer a benefit on someone in response to another's protected speech," and that "[t]his basic principle is in conflict with decisions of this Court and several circuit courts." *Id.* at 24. This misstates the findings of the Eighth Circuit. In reality, the Court of Appeals correctly concluded that the State cannot penalize persons for exercising their First Amendment rights when the purported governmental interest is not even legitimate, let alone compelling. This principle is most certainly not in conflict with the decisions of this Court or with those of other federal appellate courts.

The Petitioners then state that the "Respondents would like the law to be that if they engage in protected political speech, the government cannot do anything that might help another respond to that speech." *Id.* Again, the Petitioners misstate the case. What the Respondents want is for the State to follow basic First Amendment law which declares that the government cannot intentionally and effectively penalize persons for exercising their First Amendment rights – which is precisely what the State has done in this case.

After correctly finding that § 10A.25 subd. 13 infringes upon the political speech of Ms. Schweitz, the Eighth Circuit examined whether this infringement passes constitutional muster. It correctly concluded that it does not.

As noted, the Eighth Circuit found that because the statute only penalizes a particular type of speech – "that which advocates the election or defeat of a candidate and/or supports the election of her opponent" – this infringement is content-based. App. at A10. The Petitioners contend that this is incorrect. They maintain that under this Court's decision in *Turner Broadcasting System v. FCC*, ___ U.S. ___, 114 S.Ct. 2445 (1994), the penalty imposed by the statute is not content-based because § 10A.25 subd. 13 does not express "any favoritism toward or disagreement with any messages." Petition at 25, n.13. This argument is disingenuous.

By only penalizing the exercise of a particular kind of political expression, the State does express favoritism toward a specific type of speech, i.e., that speech the utterance of which is **not** penalized.[10] Thus, under the State's own rationale, the penalty imposed by § 10A.25 subd. 13 is content-based. Therefore, heightened scrutiny must be applied.

Next, contrary to the Petitioners' assertions, the Eighth Circuit correctly found that the statute is not narrowly tailored to serve a compelling government interest. The Court of Appeals observed that candidate

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[10] As the Court of Appeals noted, "[i]ndependent expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger the statute's limit-increases and money-shifting provisions." App. at A10.

participation in the public financing scheme – the purported interest behind the statute – was almost "100% *before* enactment of [§] 10A.25, subd. 13." *Id.* at A11 (emphasis in original). Thus, based on the plain facts, this asserted interest was not even legitimate, let alone compelling.

The State contends that its interests in "enhanc[ing] the public's confidence in the political process by encouraging candidates to accept campaign expenditure limitations and by regulating the flow of money directly into campaigns to reduce the influence of wealthy special interest groups," as well as "reduc[ing] the potential for . . . corruption," are sufficiently compelling to justify the statute's infringement on First Amendment rights. Petition at 26. Assuming *arguendo* that the Petitioners are correct,[11] they nevertheless miss the point of the Eighth Circuit's holding.

The Court of Appeals did **not** hold that these purported interests were not sufficiently compelling, but rather that they were not implicated in this case. Specifically, it stated that the State cannot realistically be concerned about a lack of candidate participation in its statutory scheme "but for" § 10A.25, subd. 13, because before this statute even existed, candidate participation was "nearing 100%." *Id.* at A11. Thus, in reality, it "clearly" was unnecessary to enact the statute in order to ensure candidate participation. *Id.*

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[11] However, as the Eighth Circuit observed, "while this may be a noble goal," it is not at all clear that such a purported interest is sufficiently compelling "to justify the burden that the statute imposes upon speech." App. at A11.

In short, given the complete lack of a factual basis for this purported concern, the Eighth Circuit could not help feeling that this alleged interest was probably "contrived for purposes of this litigation." *Id.* at A12. Accordingly, based on the plain facts, it held that the asserted interest was not legitimate.[12]

Finally, the Petitioners do not even attempt to rebut the Eighth Circuit's conclusion that the statute is not "narrowly tailored" to advance the State's purported interest. They merely note that "[b]ecause the maintenance of a high participation scheme is *directly related* to the State's compelling interest in preventing corruption . . . the independent expenditure provisions are constitutional even if they do burden free speech. (emphasis added)" Petition at 27 - 28. Again, the Petitioners miss the point.

The relevant inquiry is not whether the statute is *related* to advancing its purported objectives, but given that it treads so heavily on precious First Amendment

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[12] The State attempts to extricate itself from this factual morass by asserting that "participation rates near 100 percent in the past certainly do not guarantee full participation rates in the future." Petition at 27. It then asserts that the "record in this case shows that, in the past, participation rates have fluctuated." *Id.* There are at least three problems with this contention. One, the State does not cite that portion of the "record" which supposedly supports this factual assertion. Two, as the Court of Appeals noted, what is actually **in** the record, i.e., participation levels "nearing 100%," supports just the opposite inference: because participation rates were steadily rising in the years previous to the statute's enactment (*see* App. at A11 - A12), the statute is **not** needed to ensure participation. Three (relatedly), the notion that participation rates will drop if the statute is invalidated is pure speculation and as shown by the evidence in the record, is simply illogical.

rights, whether it is *narrowly tailored* to do so. As the Eighth Circuit observed, because of the extremely high participation rate of candidates in the public financing scheme before the enactment of § 10A.25 subd. 13, the statute's infringement on First Amendment rights could hardly be viewed as "narrowly tailored." App. at A12.[13] Therefore, the statute fails this prong of a heightened scrutiny analysis as well.

In sum, by penalizing the exercise of protected political speech, the statute infringes upon First Amendment rights. Because the statute only penalizes certain types of political speech, this infringement is content-based. Furthermore, under the plain facts, the asserted interest behind this infringement is not even implicated. Finally, due to the extremely high participation rate in the public financing scheme before the passage of the statute, the provision is not narrowly tailored to advance the State's purported interest. Therefore, the Eighth Circuit correctly held that, consistent with the principles of this Court and with similar decisions of her sister circuits, § 10A.25 subd. 13 is unconstitutional.[14]

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[13] For example, referring to the 97% participation rate before the statute was enacted, the court reasoned that "[s]urely the three percent of non-participants could be brought [into the scheme] by means less burdensome to constitutional rights – assuming that group can be brought in at all." *Id.*

[14] For the reasons set forth in its opinion, the Eighth Circuit also correctly invalidated the companion statute to § 10A.25 subd. 13, to wit, the notice provisions of § 10A.20, subd. 6b.

II. THE STATUTE IN QUESTION IS UNCONSTITUTIONAL UNDER ALTERNATE FIRST AMENDMENT GROUNDS AND UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Section 10A.25, subd. 13 also infringes the First and Fourteenth Amendment rights of Respondents Unruh and Erickson. When someone makes an independent expenditure in support of candidates Unruh and Erickson, the state will increase the expenditure limits of their political opponents while it suppresses their expenditure limits. Moreover, when someone makes an independent expenditure in opposition to their political opponents, the state will increase the expenditure limits of their opponents *and* give them public subsidies, while it suppresses the expenditure limits of candidates Unruh and Erickson and denies them public subsidies.

By suppressing their expenditure limits relative to that of their opponents and by denying them public subsidies, the State is penalizing candidates Unruh and Erickson because some other person – who is completely beyond their control – exercised their right to engage in protected speech. Quite simply, the statute is suppressing their political speech relative to that of their opponents, thereby interfering with their ability to participate in the political process. In this fashion, § 10A.25, subd. 13 infringes upon their free speech and equal protection rights.

The alleged governmental interest supporting this one-sided suppression of expenditure limits and denial of public money is to encourage candidates to opt into the public subsidy/voluntary spending limit statutory scheme (*see* discussion, *supra*). As discussed, this interest

is not even implicated in this case; moreover, assuming *arguendo* that it is implicated, the means employed by the State to advance it are not narrowly tailored. The statute thus violates the First and Fourteenth Amendment rights of candidates Unruh and Erickson.

A. The Statute Violates The First Amendment Rights Of Candidates Unruh And Erickson.

The restraints § 10A.25, subd. 13 impose on the independent expenditure limits of candidates Unruh and Erickson are content-based. As discussed in Part I, these restraints are triggered only when independent expenditures are made either in support of candidates Unruh and Erickson or against their political opponents. In other words, these restraints only come into play when independent expenditures of a particular content occur. In such a case, to pass constitutional muster the statute must be "narrowly drawn to serve a compelling state interest." *Boos v. Barry*, 485 U.S. 312, 321 (1988). The statute fails this test.[15]

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[15] Even if the restraints on the independent expenditure levels of candidates Unruh and Erickson were content-neutral, the statute would not pass constitutional muster. To be upheld in this situation: 1) the limitation must advance an important governmental interest; 2) the interest must be unrelated to the suppression of free expression; and 3) the incidental restriction on First Amendment freedoms must be no greater than is essential to furthering that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

As the Eighth Circuit observed when similarly applying the content-neutral analysis to the statute's infringement on the First Amendment rights of Ms. Schweitz, regardless of whether the purported interest of encouraging candidates to opt into the statutory scheme was "substantial, [§] 10A.25, subd. 13 cannot

For the same reasons the Court of Appeals concluded that § 10A.25, subd. 13 fails this test when applied to the statute's infringement on the First Amendment rights of Ms. Schweitz, it also fails this test in terms of its infringement on the First Amendment rights of candidates Unruh and Erickson. First, under the plain facts of this case, the interest the statute is supposed to serve is not even implicated. Thus, far from advancing a *compelling* government interest, Minn. Stat. § 10A.25, subd. 13 does not even further a *legitimate* government interest.

As the Court of Appeals observed, participation in the statutory scheme – the purported interest behind the statute – was almost "100 *before* enactment of [§] 10A.25, subd. 13." App. at A11. Thus, based upon the facts, this asserted interest was not implicated. In other words, it was unnecessary to enact the statute to ensure that candidates would opt into the statutory scheme when the overwhelming majority of them were already doing so before the statute even existed. Thus, this alleged interest is not legitimate.

Second, the statute is not narrowly tailored to advance this interest. In other words, it does not utilize

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logically be characterized as 'essential' to furthering [this alleged] interest." App. at A13. Specifically, given that "no more than an additional three percent of all candidates could be brought into the public campaign financing scheme, . . . the statute's negative impact on political speech must be in violation of the First Amendment rights of those who wish to make the independent expenditures at issue." *Id.* at A13-A14. In short, as with its burden on the First Amendment rights of Ms. Schweitz, "[t]he statute's burden on [the] First Amendment rights [of candidates Unruh and Erickson] does not satisfy strict, intermediate, or even the most cursory scrutiny." *Id.* at A14.

means that will advance the interest without unnecessarily infringing on First Amendment rights. Given the extremely high participation rate of candidates in the public financing scheme before the enactment of § 10A.25, subd. 13, the statute's infringement on First Amendment rights is not narrowly tailored. Therefore, it fails this prong of a heightened scrutiny analysis as well.

B. Because The Statute Suppresses The Political Speech Of Respondents Unruh And Erickson While Enhancing The Political Speech Of Their Political Opponents, It Denies Them The Equal Protection Of The Laws.

For purposes of Minn. Stat. § 10A.25, subd. 13, Respondents Unruh and Erickson are similarly situated with their political opponents. These individuals are all candidates; they are all subject to the Ethics Act; and they are all unable to regulate or otherwise control the activities of persons who choose to make independent expenditures in Minnesota State Elections.

Nevertheless, Minn. Stat. § 10A.25, subd. 13 classifies these candidates – Respondents Unruh and Erickson are placed in one class and their political opponents are placed in another – and then treats these classes differently if a person makes an independent expenditure against the political opponents of Respondents Unruh and Erickson. If such an expenditure is made, § 10A.25, subd. 13 will penalize Respondents Unruh and Erickson by restricting their expenditure limits and by denying them public subsidies while it increases the expenditure

limits of their opponents and provides them with public subsidies.[16]

The alleged reason for this discriminatory treatment is that it is necessary for the viability of the statutory scheme. Specifically, the State asserts it must restrict the speech of candidates Unruh and Erickson by suppressing their expenditure limits (relative to those of their opponents) and by denying them public subsidies (while it provides them to their opponents) to induce candidates to opt into the scheme. If this were not done, the State asserts, candidates would not opt into the scheme because they would be unable to respond to independent expenditures.

As shown above, in reality, this concern is simply not valid. Furthermore, the operation of the statute does not even advance its purpose. Therefore, the statute fails both a rational basis and a strict scrutiny analysis.

1. Under A Rational Basis Analysis, The Statute's Disparate Treatment Of Respondents Unruh And Erickson Is Unconstitutional.

Because § 10A.25, subd. 13 affects the exercise of a fundamental right (*see* Part 2, *infra*), the Court should utilize a strict scrutiny analysis when evaluating the disparate treatment the statute affords candidates Unruh and Erickson. Nevertheless, if the Court declined to apply this standard, it would still find the statute unconstitutional because it is not rationally based.

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[16] Similarly, if independent expenditures are made in support of Respondents Unruh and Erickson, their opponents will receive increased expenditure limits, while their expenditure limits are suppressed. Minn. Stat. § 10A.25, subd. 13(a).

The operation of § 10A.25, subd. 13 does not advance its purported rationale for treating candidates differently, to wit, encouraging candidates to opt into the campaign finance scheme by enabling them to adequately address the "problem" of independent expenditures that are made during the campaign. As the State admits, it purposefully excludes from the public subsidy component of the statute any independent expenditures that occur during the primary election. [Petition at 12, n.6: "§ 10A.25, subd. 13(c) (Supp. 1993) has no application to independent expenditures made in connection with a primary election . . . "]

In other words, even though a large portion of independent expenditures – responding to which is the principal aim of the statute – are made during the primary, the State has excluded all such expenditures from the scope of the statute's public subsidy component. In short, it is illogical to completely exclude a large portion of independent expenditures from the scope of this component, when combatting independent expenditures is claimed to be critical to the operation of the statutory scheme, and in fact, is the primary (claimed) purpose of the statute itself.

Thus, because § 10A.25, subd. 13 is not even rationally related to accomplishing its goal of enabling candidates who opt into the statutory scheme to reply to independent expenditures, it fails a rational basis test. Consequently, its disparate treatment of candidates is unconstitutional.

2. Under A Strict Scrutiny Analysis, The Statute's Disparate Treatment Of Respondents Unruh And Erickson Is Unconstitutional.

When a First Amendment right is involved in an equal protection claim, it is necessary to apply strict scrutiny to evaluate the different treatment of the classes involved. *New York Club Association v. City of New York*, 487 U.S. 1, 13-16 (1988). One must examine: 1) the justification for treating the classes differently, i.e., whether the government had a compelling interest to treat the classes differently; 2) whether the statute advances the interest behind treating the classes differently; and 3) whether the statute advances this interest without unduly infringing upon protected freedoms. In this case, under **two** separate frameworks, the different treatment § 10A.25, subd. 13 affords candidates fails all **three** parts of this test.

First, the State asserts it is necessary to suppress the expenditure limits of the Respondents and to deny them public subsidies in order to encourage other candidates to opt into the scheme. Thus, the State believes that because it wants to allegedly "subsidize" certain candidates, it can utilize § 10A.25, subd. 13 to penalize candidates Unruh and Erickson.

Assuming, *arguendo*, that this case merely involves the provision of benefits, it is true that the government does not have the obligation to subsidize all speech equally. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546-547 (1983). However, there is no **compelling interest** in penalizing a person by suppressing their speech in order to enhance the speech of another. Yet this is precisely what the State seeks to do.

In sum, simply because the State wants to award the opponents of candidates Unruh and Erickson with public subsidies and higher expenditure limits, it cannot use this desire to suppress the Respondents' speech. Such a purpose is not a compelling interest for restricting their First Amendment rights.

Furthermore, as discussed in part 1, because of the operation of § 10A.25, subd. 13, the interest behind treating the candidates is not even advanced by the statute.

Finally, § 10A.25, subd. 13 does not advance the purported interest in treating the candidates differently in a way that is narrowly tailored to advance that interest. In short, because the statute does not advance the State's interest in inducing candidate participation in the statutory scheme, then, by definition, in treating the Respondents differently than their opponents, it *unduly* infringes upon their First Amendment rights.

Second, as discussed in Part I, under the facts of this case, the State's interest in enacting § 10A.25, subd. 13 is not implicated. Specifically, as noted, *before* the enactment of the statute, candidate participation in the statutory scheme was already very high; in short, then, there was simply no need to pass this statute to induce candidate participation in the scheme. Thus, because this purported interest is not even implicated under the facts, it fails to be legitimate, let alone compelling.

Furthermore, it is highly dubious whether the purported interest behind this differential treatment of candidates is even advanced by the statute. As the Court of Appeals observed, given the 97% level of candidate participation in the statutory scheme before the enactment of § 10A.25, subd. 13, it is questionable whether "that group

[i.e., the remaining three percent] could be brought in at all." App. at A12.

Finally, the statute does not advance the purported interest in treating the candidates differently in a way that is narrowly tailored to advance that interest without unnecessarily infringing on the Respondents' First Amendment rights. As discussed, and as observed by the Court of Appeals, given the high rate of candidate participation before § 10A.25, subd. 13 was enacted, the statute's sweeping infringement on the Respondents' rights to free speech and the equal protection of the laws could hardly be viewed as "narrowly tailored." *Id.*

In sum, under both the aforementioned frameworks, the statute's different treatment of Respondents Unruh and Erickson fails a strict scrutiny analysis and is thus unconstitutional.

III. THIS CASE INVOLVES BASIC AND STRAIGHTFORWARD PRINCIPLES OF CONSTITUTIONAL LAW AND THIS COURT SHOULD DEVOTE ITS RESOURCES TO CASES OF GREATER IMPORT TO THE NATION.

As demonstrated in Parts I and II, *supra*, § 10A.25, subd. 13 is unconstitutional for several reasons under both the First and Fourteenth Amendments. In sum, then, not only was the Court of Appeals correct in invalidating the statute on the grounds that it violates the First Amendment rights of Ms. Schweitz, but it just as easily could have invalidated it on the grounds that it violates the First and Fourteenth Amendment rights of candidates Unruh and Erickson. Therefore, this Court should not grant the petition and thereby utilize its precious resources in hearing this case when the decision of the

Court of Appeals effected the correct result: the invalidation of an unconstitutional statute.

Furthermore, given the enormous and unequivocal protection this Court in *Buckley* afforded the right to engage in protected political expression by making independent expenditures, it is unnecessary for this Court to reiterate these clear principles in this case. Quite simply, neither Congress nor any state legislature would probably attempt to violate the principles from *Buckley* as the State of Minnesota has blatantly done in this case. Thus, this Court need not render what would amount to an advisory opinion on the continuing validity of *Buckley*.

CONCLUSION

For the above-stated reasons, this Court should deny the petition in this case.

Dated: December 30, 1994.

Respectfully submitted,

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In the
Supreme Court of the United States
October Term, 1994

JOHN L. HOLAHAN, JR.,
as Chair of the Minnesota Ethical Practices Board;
HUBERT H. HUMPHREY III,
as Attorney General of the State of Minnesota,
Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA; et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT JACQUELINE A. SCHWIETZ IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a state statute intended to discourage the non-candidate independent expenditures of three "special interest" groups by granting increased spending limits and public subsidies to candidates targeted by independent expenditures impermissibly restricts the protected speech of the non-candidate making the independent expenditures.

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STATEMENT OF THE CASE

Introduction

This case involves a successful First Amendment challenge to campaign finance law amendments adopted by the 1993 Minnesota legislature at the specific urging of the governor. The amendments were intended to restrict independent expenditures by three "special interest" groups whose collective non-candidate spending through their political funds accounted for 86.8% of all independent expenditures in Minnesota in the 1992 state legislative election year. The legislation sought to achieve that result in two ways. First, by providing for notice, increased spending limits and public subsidies to candidates against whom independent expenditures are made, the amendments were designed to discourage independent expenditures. Second, by limiting contributions to political funds to $100 per year, the amendments sought to restrict non-candidate political funds in raising money with which to make independent expenditures.

The Eighth Circuit sustained constitutional challenges to both of the means chosen to restrict independent expenditures. The State now seeks review of the court's decision with respect to one of them--the independent expenditure amendments.[1] The Petition should be denied because (1) it does not meet the criteria of Rule 10, (2) this case has no national implications, on the record made below, (3) the Eighth Circuit's decision is consistent with existing precedent, and (4) the ill-considered statutory framework has left the State unable to implement the public subsidy provision and therefore renders it unlikely that this Court would reach the

[1] Both the district court and the Eighth Circuit struck down the $100 contribution limit, and the State does not seek review on that issue.

merits of the First Amendment issues if the Petition were granted.

The Proceedings Below

This action was commenced in the District of Minnesota on December 20, 1993 by the Respondent Jacqueline A. Schwietz, as Treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates ("MCCLCSPC") and others.[2] The Complaint challenged 1993 amendments to Minnesota's Ethics in Government Act, Minn. Stat. § 10A.01 *et seq.* ("Ethics Act") imposing a $100 limit on contributions by individuals to non-candidate political funds, Minn. Stat. § 10A.27, subd. 12, and providing for notice, increased spending limits and public subsidies to candidates against whom independent expenditures are made, Minn. Stat. §§ 10A.20, subd. 6b and 10A.25, subd. 13.[3] The Complaint named as Defendants Vanne Owens Hayes, as Chair of the State Ethical Practices Board,[4] and Hubert H. Humphrey III, the State Attorney General ("State").

On May 27, 1994, the district court granted judgment to the Plaintiffs declaring unconstitutional and enjoining enforcement of the $100 contribution limit to political funds,

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[2] Two separate actions were commenced in the district court and were considered and decided jointly by the court. Three separate appeals and a cross-appeal were taken from the district court's decision, and were consolidated by the Eighth Circuit.

[3] The Complaint also challenged amendments to Minnesota's Fair Campaign Practices Act, Minn. Stat. § 211B.01, *et seq.*, governing contributions and independent expenditures by non-profit corporations, Minn. Stat. § 211B.15, subds. 2, 3 and 15. The Eighth Circuit struck down those provisions, and the State does not seek review of the underlying issues.

[4] John L. Holahan, Jr. was later substituted as Chair of the Board.

but granted judgment to the State in all other respects, including the independent expenditure issues. [App. at A69.][5]

On June 3, 1994, MCCLCSPC filed a Notice of Appeal to the Eighth Circuit. The appeal was expedited by the court because of the imminence of Minnesota's September 13, 1994 primary election.

On September 1, 1994, the Eighth Circuit affirmed the district court's invalidation of the $100 contribution limit, reversed the district court on the independent expenditure issues and other issues, and remanded the cases for the entry of judgment in the Plaintiffs' favor on all issues. Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994).

On November 30, 1994, the State filed its Petition for a Writ of Certiorari.

Organization and Fundraising of MCCLCSPC

MCCLCSPC is a non-candidate political fund registered with the State Ethical Practices Board under Minn. Stat. § 10A.14. MCCLCSPC obtains its funds solely through contributions from individuals, including members of Minnesota Citizens Concerned for Life, Inc., a non-profit corporation ("MCCL") and others who share MCCLCSPC's political views. MCCLCSPC solicits contributions from MCCL's approximately 24,000 member-families by renting MCCL's mailing list and using it to make mail and telephone solicitations. During the period from January 1, 1990 through December 31, 1992 (1990 and 1992 were general election years in Minnesota), MCCLCSPC received contributions from approximately 7,000 individuals totalling $295,453. [Affidavit of Jacqueline A. Schwietz at 2, ¶¶ 3, 4; Second Affidavit of Jacqueline A. Schwietz at 3, ¶ 4.]

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[5] The State's Appendix is referred to herein as "App." and the MCCLCSPC's Appendix is referred to as "R. App."

Independent Expenditures of MCCLCSPC

During the same period, MCCLCSPC made expenditures in support of, and in opposition to, statewide and legislative candidates totalling $264,995. Virtually all of these expenditures were "independent expenditures" as defined in Minn. Stat. § 10A.01, subd. 10b. Typically, acting independently of candidates and their campaigns, MCCLCSPC supports or opposes particular candidates by circulating literature, running newspaper or radio ads and conducting "get out the vote" campaigns, all directed at pro-life voters. [Affidavit of Jacqueline A. Schwietz at 2-3; Exs. A-C.]

MCCLCSPC prefers making independent expenditures to making direct contributions to candidates because MCCLCSPC and its supporters believe that their funds are more effectively spent in conveying their own pro-life and anti-abortion message, and in targeting their own membership and other pro-life voters, than in contributing funds to candidates who may not give similar emphasis to, or even discuss, the abortion issue during the course of their campaigns. [Second Affidavit of Jacqueline A. Schwietz at 9; Affidavit of Eileen Angell at 2.]

Independent Expenditures
in Minnesota Elections

MCCLCSPC is one of three principal makers of independent expenditures in Minnesota elections. The other two are the Minnesota Education Association's political fund, the Respondent IMPACE-MEA, and the National Rifle Association's political fund, NRA Political Victory Fund ("NRA"). [Second Affidavit of Jacqueline A. Schwietz at 7, ¶ 12.]

In the 1990 statewide and legislative election year, these three political funds collectively accounted for $241,140 of

$394,963, or 61%, of all independent expenditures reported to the Ethical Practices Board by a total of 34 political funds, committees and party committees.[6] The 34 committees reporting independent expenditures during 1990, in turn, represented less than 5% of the 483 political committees and political funds, and 313 political party committees, filing reports with the Board. [Affidavit of Caryn S. Glover, Ex. D.]

In the 1992 legislative election year, MCCLCSPC, IMPACE-MEA and NRA accounted for $287,788 of $331,672, or 86.8%, of all independent expenditures reported to the Board by a total of 16 funds and committees.[7] The 16 committees reporting independent expenditures, in turn, represented only 2% of the 435 political committees and political funds, and 353 political party committees, filing reports with the Board. [Affidavit of Caryn S. Glover, Ex. C.]

Independent expenditures likewise represent a minuscule percentage of political spending in Minnesota, whether viewed as contributions to candidates or as expenditures on behalf of, or in opposition to, candidates. Contributions to candidates for statewide and legislative office in the 1990 election year totalled $12.9 million. [Affidavit of Caryn S. Glover, Ex. D.] If all independent expenditures are added to, and included in, that total, they represent only 2.5% of political contributions to statewide and legislative candidates. Total expenditures by statewide and legislative candidates in 1990 were $14,082,796. [Id.] If independent expenditures are added to,

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[6] MCCLCSPC alone reported $163,129 in independent expenditures, or 41.3% of the total. IMPACE-MEA reported $44,584, and NRA $33,426. [Second Affidavit of Jacqueline A. Schwietz at 7, ¶ 12; Affidavit of Caryn S. Glover, Ex. A.]

[7] MCCLCSPC reported $84,467, IMPACE-MEA $153,807 and NRA $49,514. [Second Affidavit of Jacqueline A. Schwietz at 7, ¶ 12; Affidavit of Caryn S. Glover, Ex. A.]

and included in, that total, they represent only 2.3% of campaign spending.

Contributions to legislative candidates in the 1992 election year totalled $6,521,344. [Affidavit of Caryn S. Glover, Ex. C.] If aggregate independent expenditures are added to, and included in, that total, they represent only 5.7% of contributions. Total expenditures by legislative candidates in 1992 were $9,154,943. [Id.] If independent expenditures are added to, and included in, that total, they represent only 4.1% of campaign spending.

All of the foregoing information was known or readily available to the legislature and the governor when the amendments to the Ethics Act were adopted in 1993.

Legislative History of
The Public Subsidy
Provision

Contrary to the impression sought to be created by the State (Pet. 4-7), the concept of giving public subsidies to candidates against whom independent expenditures are made, Minn. Stat. § 10A.25, subd. 13(c), was not the product of a bipartisan "task force," and was not part of either of two major campaign reform proposals presented to the 1993 Minnesota legislature. One of the proposals was sponsored by Common Cause, the other by State Senator John Marty. The Common Cause proposal contained no provisions regulating or restricting independent expenditures. The Marty bill contained provisions similar to those ultimately enacted as Minn. Stat. §§ 10A.20, subd. 6b and 10A.25 subds. 13(a) and (b), requiring notice of independent expenditures to the Board within 24 hours of a political fund becoming obligated to make them, and increasing the expenditure limits of candidates affected by independent expenditures, but contained no provision regarding public subsidies for affected candidates.

The public subsidy provision was offered as an amendment to the Common Cause proposal in the House by Representative Kathleen Blatz on March 8, 1993, and as an amendment to the Marty bill by Senator Marty on the following day. [R. App. at A-3.] The Joint House/Senate Conference Committee deleted Marty's increased expenditure limit and public subsidy provisions from the bill on May 2, 1993, and rejected an offer by Senator Marty to reduce the matching public subsidy from 100% to 50% of an independent expenditure. The House and Senate then passed the Conference Committee bill. [Id.] On May 11, 1993, the bill was vetoed by Governor Arne Carlson, who delivered a strongly-worded message attacking the legislature's failure "to provide for any response to special interest independent expenditures." [R. App. at A-28.]

Four days later Senator Marty successfully moved to substitute the vetoed bill for another bill, with the only substantive revisions in the vetoed bill being the addition of an increased expenditure limit provision and a 50% public subsidy for candidates affected by independent expenditures. With that amendment, the bill passed the House and the Senate on the same day, was signed by Governor Carlson and became effective on May 21, 1993. [R. App. at A-4, 22.]

Legislative Intent of The
Public Subsidy Provision

The legislative purpose ascribed by the State to the 1993 independent expenditure amendments in the Petition is at least the third different justification it has advanced in this litigation. [Pet. 6-7, 26-7.] However, the State's present rationale--to provide an additional "incentive" to candidates to participate in the scheme of public financing--has absolutely no basis in the

record.[8] The entire legislative discussion of the public subsidy provision centered around its sponsor's firm conviction that if his amendments were adopted, independent expenditures would be dramatically curtailed because political funds would effectively be discouraged from making them.

During a Senate Finance Committee meeting on April 17, 1993 and during full Senate consideration on April 20, 1993, the discussions focused on two principal concerns which Senator Marty believed were addressed by his public subsidy provision. The first concern was that if contributions by political funds, or PACs, to candidates were severely limited,[9] without restricting independent expenditures, a "loophole" would be left for PACs seeking a way around the contribution limit, i.e., the opportunity afforded to make unlimited independent expenditures. The second major concern was that the unrestricted ability of PACs to make independent expenditures late in the campaign against candidates who had agreed to spending limits as a condition of becoming eligible

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[8] In fact, as the Eighth Circuit said: "One could hardly be faulted for concluding that this compelling state interest was contrived for purposes of this litigation." 34 F.3d at 1361.

[9] As previously indicated, the purpose of limiting contributions to political funds to $100 was to restrict the ability of political funds to raise money to make independent expenditures. Senator Marty, whose bill at one time also proposed a total prohibition on contributions by political funds to candidates receiving public financing, said that even with such a prohibition a $100 contribution limit to political funds was necessary to curtail independent expenditures. "Why do we need [the $100 limit] if we're banning PAC contributions to candidates? It's simply back to the independent expenditure issue." And, again, "I think that [the $100 limit] is very helpful in terms of addressing some people trying to use it as a loophole in the spending limits through independent expenditures." [R. App. at A-23.] The legislature adopted the $100 limit on contributions to PACs, but permitted election-year contributions by individuals of $2,000 to candidates for governor and $500 to legislative candidates. Minn. Stat. § 10A.27.

for public subsidies for their campaigns would leave those candidates at a disadvantage, even if their expenditure limits were increased, because they could not raise funds through individual contributions quickly enough to respond to last minute PAC spending.

At the Senate Finance Committee meeting on April 17, in responding to questions as to why contributions to PACs were being limited, but independent expenditures would continue to be allowed, Senator Marty acknowledged that the legislature could not constitutionally restrict independent expenditures, but characterized his bill as "the next best thing" which would accomplish the same end. He said:

> There is no penalty, we are not allowed to restrict them, what we do instead is--if I make an expenditure on the behalf of your opponent, I have to report . . . when I agree to make one, that means I talk to a printer and I want you to print this brochure, you get notified of that. Your limit goes up by that amount, your public financing goes up by that amount. You then know that . . . I was going to spend $10,000 on your opponent's behalf, wherever it came from in my PAC, however I raise that money, I'm going to spend $10,000 on your opponent, you get $10,000 public money to counter that. You didn't have to fight to raise it, you didn't have any trouble raising it, you got it and realistically that's my response . . . , **I'm not going to make that expenditure because I'm not stupid.** [Emphasis added.]

[R. App. at A-14-15; Affidavit of Mary Frances Wilson, Ex. 1 at 18.]

Similarly, on April 20, 1993, in opposing another motion to delete the public subsidy provision, Senator Marty assured his colleagues that the bill's open appropriation to fund public

subsidies in response to independent expenditures was nothing to worry about:

> As far as an open appropriation and so on for this, basically what's going to happen is a lot of groups are going to decide we're not going to try and use this as a loophole around the limits because frankly the other side's going to get the money handed to them and they're going to be able to counter it and therefore maybe we don't really want to use our hard earned money on that purpose.[10]

[R. App. at A-20; Affidavit of Mary Frances Wilson, Ex. 1 at 35-36.]

The public subsidy and increased expenditure limit provisions were deleted in Conference Committee and the bill passed the House and Senate with only a notice provision for independent expenditures. Governor Carlson vetoed the bill. [R. App. at A-4, 20-1.]

The vetoed bill was returned to the legislature, amended in only one respect--the insertion of provisions granting increased expenditure limits and a 50% public subsidy to candidates targeted by independent expenditures--and passed again. This time, Governor Carlson signed the bill, subject to an unrelated line-item veto. In doing so, he noted that in the future "additional public subsidy may be justified to discourage independent expenditures by special interests . . . ." [R. App. at A-33.]

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[10] Additional examples of the legislative discussion of the public subsidy provision are contained in the Respondent's Appendix at A-4-20.

REASONS FOR DENYING THE PETITION

I. THE PETITION DOES NOT MEET THE CRITERIA OF RULE 10 AND PRESENTS NO SPECIAL AND IMPORTANT REASONS FOR DISCRETIONARY REVIEW.

The State's Petition makes no effort to meet the criterion of Rule 10.1(a) that a circuit court's decision is in conflict with the decision of another circuit "on the same matter." Instead, the State says that the decision "conflicts with First Amendment principles" articulated by this Court and other circuit courts [Pet. 17], which would not be sufficient under Rule 10 even if it were true. [See pp. 13-21, infra.] Nor did the lower court decide an important question of unsettled federal law, the only other Rule 10 criterion even remotely suggested by the State. [Pet. 17, 28.] The issues here are confined solely to the application of settled First Amendment principles to specific state statutes, on the record made below. On that record, the Eighth Circuit's decision is consistent with decisions of this Court and other circuits. Granting the Petition is therefore not warranted under the considerations governing review expressed in Rule 10.

II. THIS CASE HAS NEITHER ACTUAL NOR POTENTIAL NATIONWIDE RAMIFICATIONS.

The State's contention that this case presents an important issue of constitutional law with "potential nationwide ramifications" [Pet. 28-30] is belied by the record.[11] The

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[11] The State's suggestion that this Court's decision of the independent expenditure issues presented by Minnesota's 1993 campaign finance law amendments would "aid Congress" in dealing with "the growing national concern over independent expenditures" [Pet. 29, 30] is not only inappropriate, as a consideration governing discretionary review,

Respondents' First Amendment challenges succeeded (1) because the legislative history of the public subsidy and $100 contribution limit provisions demonstrated the dual underlying purpose of discouraging protected political speech by non-candidate political funds and crippling their ability to raise funds with which to make non-candidate expenditures, and (2) because the undisputed facts concerning the pre-existing levels of candidate participation in Minnesota's scheme of publicly financed campaigns, and the historically insignificant levels of non-candidate independent expenditures, overwhelmingly negated the post-hoc rationalizations offered by the State as the "governmental interest" allegedly advanced by the challenged amendments.

In the 1992 general election year in Minnesota 97% of all legislative candidates agreed to spending limits as a condition of receiving public subsidies for their campaigns. That level of participation existed before the 1993 amendments were adopted, which the State now says were intended to provide a further "incentive" for candidate participation. In the same election year, three "special interests" accounted for 86.8% of all independent expenditures, and their collective spending represented less than 2½% of total campaign spending in the State.

In short, the record in this case does not lend itself to drawing national implications from the Eighth Circuit's decision. Instead, as correctly perceived by the Eighth Circuit, it demonstrates vividly how narrow political considerations in

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but ludicrous in light of the record in this case. The "concern" about independent expenditures by the majority of Minnesota's legislators and its governor was not a concern over the pervasiveness of independent expenditures, or the proliferation of non-candidate political funds making independent expenditures in Minnesota elections, but rather a concern about the perceived threat to incumbency posed by the very modest spending of three "special interests."

Minnesota overcame constitutional concerns in a legislative rush to quiet three voices.

III. THE EIGHTH CIRCUIT'S DECISION THAT THE INDEPENDENT EXPENDITURE PROVISIONS CHILL THE FREE EXERCISE OF PROTECTED SPEECH IS CONSISTENT WITH EXISTING PRECEDENT.

The undeniable purpose of the independent expenditure provisions was to discourage independent expenditures by creating a disincentive for them in the form of public subsidies to candidates targeted by non-candidate speech.

The provisions were enacted to punish MCCLCSPC's exercise of its right to free speech, and they effectively discourage and deter MCCLCSPC from engaging in such protected speech. The provisions represent the Minnesota legislature's attempt to circumvent Buckley v. Valeo, and are therefore unconstitutional under well-settled First Amendment precedent.

As the Eighth Circuit concluded:

> It is clear that independent expenditures are protected speech. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression. . . ." Buckley v. Valeo, 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976) (per curiam). It is equally clear that section 10A.25, subd. 13 infringes on that protected speech because of the chilling effect the statute has on the political speech of the person or group making the independent expenditure. As the potential "independent

> expenders" allege in their briefs (and as at least one sponsor of the legislation intended), the mere enactment of section 10A.25, subd. 13 already has prevented many if not most potential independent expenditures from ever being made. The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech. This "self-censorship" that has occurred even before the state implements the statute's mandates is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship. See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757-58, 108 S.Ct. 2138, 2144, 100 L.Ed.2d 771 (1988).

34 F.3d at 1360 (footnotes omitted). The Eighth Circuit's conclusion is consistent with prior decisions of this Court.

For example, in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) this Court held that a state statute which required a newspaper to print a reply from a candidate whose character or record had been challenged editorially by the newspaper violated the First Amendment. The Court concluded that the statute unlawfully "exacts a penalty on the basis of the content of a newspaper" in two phases. The first is exacted from the additional costs associated with printing the reply and taking up space that could have been devoted to other uses. The second phase of the penalty, this Court said, is the statute's intrusion into the rights of the speaker, the newspaper editor.

> Faced with the penalties that would accrue to any newspaper that published news or commentary

> arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.

418 U.S. at 257 (emphasis added). Likewise, the notion that the making of an independent expenditure will result in a subsidy to a candidate MCCLCSPC opposes is so repugnant to MCCLCSPC that it may well conclude the safe course is to refrain from making independent expenditures, or to make them at substantially reduced levels. As the Eighth Circuit held, the public subsidy provision is therefore an intrusion into MCCLCSPC's First Amendment rights, and exacts a penalty on the basis of the content of its speech.

The State contends that the challenged legislation does not implicate the First Amendment because "these laws in no way restrict the making of, or dictate the content of messages financed through, independent expenditures." [Pet. 14.] The State ignores the Eighth Circuit's conclusion that the legislation is punitive in that it attempts to discourage and deter MCCLCSPC from engaging in political speech.

The Eighth Circuit appropriately implemented a two-part test to evaluate whether legislation which burdens the exercise of political speech passes constitutional muster: 1) the legislation must serve a compelling state interest; and 2) the legislation must be "narrowly tailored" to achieve that goal. Buckley, 424 U.S. at 44-45; Burson v. Freeman, 112 S.Ct. 1846, 1851 (1992); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666 (1990); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 32 (1st Cir. 1993). "To survive strict scrutiny . . . a State must do more than assert a compelling state interest--it must demonstrate that its law is necessary to serve the asserted interest." Burson, 112 S.Ct. at 1852.

A. THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT THE MINNESOTA STATUTE IS NOT CONTENT NEUTRAL.

This Court has applied "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." Turner Broadcasting System, Inc. v. Federal Communications Commission, 114 S.Ct. 2445, 2459 (1994). In fact, "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986).

Although the assessment of whether a statute is content neutral is not always easy, this Court has set forth general principles for consideration, which were utilized by the Eighth Circuit. The Court has described content neutral regulations as those which "'are *justified* without reference to the content of the regulated speech.'" Renton, 475 U.S. at 48 quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). More recently, this Court said "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." Turner, 114 St. Ct. at 2459.

Further, this Court has determined that regulations which impermissibly deter protected speech are not content neutral. See Pacific Gas and Electric Co. v. Public Utilities Commission of California, 475 U.S. 1 (1986); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In Pacific Gas, the Court held that an order of the California Public Utilities Commission which required a privately owned utility to include in its monthly billing envelopes speech of a third party with which it did not agree was not "content neutral" because access to the envelopes was limited to persons who

disagreed with the utility's views, as expressed in its newsletter. 475 U.S. at 15. "The danger that [the speaker] will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected . . ." 475 U.S. at 16.

The State misperceives the Eighth Circuit's decision by characterizing it as a conclusion "that a state cannot confer a benefit on someone in response to another's protected speech." [Pet. 24.] To the contrary, the lower court viewed the statute as exacting a content-based penalty which is plainly unconstitutional. Consistent with the teachings of Turner, Miami Herald and Pacific Gas the Eighth Circuit said:

> Section 10A.25, subd. 13 singles out particular political speech -- that which advocates the defeat of a candidate and/or supports the election of her opponents -- for negative treatment that the state applies to no other variety of speech. See Burson v. Freeman, 112 S.Ct. 1846, 1850, 119 L.Ed.2d 5 (1992) ("Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech . . . ."). We have no difficulty concluding that this is a statute that "by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed," and thus it cannot be content-neutral. Turner Broadcasting, 114 S.Ct. at 2459.

34 F.3d at 1360-1361.

B. THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT THE CHALLENGED LEGISLATION WAS NOT NARROWLY DRAWN TO SERVE A COMPELLING STATE INTEREST.

Political expression is "at the core of our electoral process and of the First Amendment freedoms." Buckley v. Valeo, 424 U.S. 1, 39 (1976) (quoting from Williams v. Rhodes, 393 U.S. 23, 32 (1968)). Independent expenditures, as defined by Minn. Stat. § 10A.01, subd. 10b, are clearly a form of political expression, entitled to the most rigorous First Amendment protections. Buckley, 424 U.S. at 39.

The constitutionality of the 1993 amendments to Minnesota's Ethics Act restricting independent expenditures, Minn. Stat. §§ 10A.20, subd. 6b and 10A.25, subd. 13, therefore turns on "whether the governmental interests advanced in [their] support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." Id. at 44-45.

Independent expenditures, by their nature, do not carry the threat of corruption posed by large campaign contributions. This Court has said as much: "[I]ndependent advocacy does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." Buckley, 424 U.S. at 47. In fact, far from threatening to "corrupt" the electoral process, independent expenditures contribute to the essence of it, a wide-open, healthy and robust debate on the issues.

The State offers as the governmental interest in support of the legislation the preservation of the viability of publicly financed campaigns by encouraging candidates to accept voluntary spending limits as a condition of receiving public financing for their campaigns. [Pet. 26.] The State now characterizes this "compelling" interest as follows:

> Candidates facing the potential for unlimited independent expenditures being made against them might reject the limits for fear of being unable to respond adequately. [Id.]

As the Eighth Circuit recognized, the State's professed interest is not legitimate given the undisputed facts. Minnesota's system of publicly financed campaigns is not threatened by independent expenditures. During the two most recent publicly-financed election campaigns, 1992 and 1990, fewer than 5% of political committees and funds in Minnesota made any independent expenditures, and aggregate independent expenditures by all political committees and funds accounted for only 3.1% of total campaign spending. Second, the suggestion that "additional incentives" afforded by public subsidies occasioned by independent expenditures are necessary to encourage candidates in Minnesota to accept spending limits and public financing is preposterous. In 1992, before the independent expenditure provisions were adopted, 97% of all legislative candidates in Minnesota agreed to spending limits as a condition of receiving public subsidies. In the statewide and legislative elections of 1990, that figure was 96%. Thus, preserving the "viability" of a firmly-entrenched, unthreatened system of publicly financed campaigns by offering totally unnecessary additional "incentives" to the three or four percent of candidates who have not already embraced the system falls far short of an important or substantial governmental interest, particularly when that interest is directly related to the discouragement of political expression by non-candidate committees.[12]

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[12] Despite the State's denial in the lower court that it seeks to advance "leveling the playing field" as a governmental interest supporting the legislation, "leveling the playing field" is a necessary corollary of the unspoken "additional incentive" to which the State repeatedly refers. The "additional incentive" is money, in the form of an

Based upon this record, the Eighth Circuit understandably concluded:

> Clearly, the campaign reform legislation was not necessary to encourage candidates' involvement in public campaign financing, as participation was approaching 100% before the new campaign finance laws were passed in 1993. One hardly could be faulted for concluding that this "compelling" state interest was contrived for purposes of this litigation.

34 F.3d at 1361. The Court went on to say that even if the statutes were deemed content neutral "[t]he statute's burden on First Amendment rights does not satisfy strict, intermediate, or even the most cursory scrutiny." 34 F.3d at 1361.

Despite the indisputable record, the State again contends that "[i]f anything, the high participation rates before the enactment of the new law *heightens* the State's interest in seeing that these rates do not drop significantly as a result of the increased likelihood that more independent expenditures will be made against candidates in the future." [Pet. 27; emphasis in original.] The Eighth Circuit effectively dismissed that absurdity:

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additional public subsidy. And the purpose of the money, as acknowledged by everyone who spoke during the legislative debates, as well as by the governor, was to provide a candidate "victimized" by an independent expenditure the wherewithal to respond to an "attack" on his or her candidacy. Providing public funds to enable candidates to "respond to speech made through independent expenditures" is an effort to level the playing field whether the State will admit it or not. And, leveling the playing field when the playing field is speech, particularly political speech is not a legitimate governmental interest. Buckley, 424 U.S. at 49-50.

> To the extent that the state's brief can be read as arguing that the level of candidate participation in publicly financed campaigns may be eroded in the absence of these limitations on the speech and association rights of those who wish to make independent expenditures, the argument lacks factual support and must be regarded as wholly speculative.

34 F.3d at 1361 n.6.[13]

IV. IF THE PETITION IS GRANTED, THIS COURT IS NOT LIKELY TO REACH THE MERITS OF THE ISSUE SOUGHT TO BE RAISED BY THE STATE.

This Court should not grant a petition under circumstances where it is likely to conclude that the state statute under review cannot be implemented to achieve its intended result.

Contrary to the State's assertions [Pet. 9, n5, 12, n6], but as recognized by the Eighth Circuit [A7-8, n.2], under the present statutory framework, the public subsidy provision cannot be implemented by the Board in a manner that would serve its intended purpose of providing pre-election subsidies to candidates targeted by independent expenditures, to permit them a pre-election opportunity to respond. The State "concedes" that the statute cannot be implemented to provide pre-election subsidies in primary elections,[14] but erroneously

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[13] The pre-1990 statistics cited by the State [Pet. 27] in support of its unfounded argument are not contained in the record.

[14] The State's "concession," first made in the Eighth Circuit, was made in a last-ditch effort to save the public subsidy provision for the November 1994 general election. It was made only after the State realized that application of the statutory scheme to primary elections would produce totally arbitrary, unintended results, in that public

asserts that pre-election subsidies can be paid to targeted candidates from "the State's general fund" in general election campaigns. [Pet. 12, n.6.][15] That is not the case.

Under Minn. Stat. § 10A.25, subd. 13(c), upon receipt of a notice of an independent expenditure under Minn. Stat. § 10A.20, subd. 6b(a), the Board is directed to notify the affected candidates and to pay a public subsidy to each candidate against whom an independent expenditure has been made, "if the candidate is eligible to receive a public subsidy . . . ."

Public subsidies paid from the state elections campaign fund originate either in "party accounts" maintained for major political parties and qualifying minor parties, or in the "general account." Minn. Stat. § 10A.31. Funds in the party accounts are distributed in connection with contested primary elections, to the winners of the elections. Minn. Stat. § 10A.31, subd. 6. Funds in the general account are distributed in connection with general elections, to statewide candidates who receive at least 5% of the vote and to legislative candidates who receive at least 10% of the vote. Minn. Stat. § 10A.31, subd. 7.

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subsidies to "victims" of independent expenditures could be paid only after the elections were held, and only to winners of the primaries. Nothing in the language of the independent expenditure amendments themselves, however, and nothing in their legislative history, suggests that the statutes apply to general elections, and not to primaries. In fact, in urging appropriate legislation in his initial veto message, the governor decried the inability of a candidate to "respond to special interest independent expenditures directed against that candidate prior to a post-September 1 Primary or the General Election." The legislature adopted the provisions in question immediately thereafter.

[15] The State's assertion that the Board "has interpreted [Minn. Stat.] § 10A.25, subd. 13(c) to allow for payment of public subsidies after the primary election" is without any basis in the record. No public subsidies were paid in response to independent expenditures in Minnesota's 1994 general election campaign because of the injunction against enforcement of the provisions entered as part of the Eighth Circuit's decision.

Eligibility for a public subsidy from the general account is not determined by prior success in a primary election. Thus, even if a candidate against whom an independent expenditure is made during a general election campaign was the winner of a contested primary election, and therefore qualified for and received a public subsidy from the primary account of his political party, that candidate is not "eligible to receive a public subsidy" from the general account unless and until he or she obtains the requisite 5% or 10% of the vote in the general election, as thereafter certified by the state canvassing board. As the Eighth Circuit recognized, the Board therefore cannot implement Minn. Stat. § 10A.25, subd. 13(c) within the time period provided in it, and no pre-election subsidies can be paid prior to either primary elections or general elections, as the statutory scheme presently exists.

Finally, the Court should be aware that if the Petition is granted, the Court will also be confronted with a void-for-vagueness issue concerning the notice provision of the statute, Minn. Stat. § 10A.20, subd. 6, not addressed by the Eighth Circuit.[16] The statute requires a political fund to notify the Board and affected candidates within 24 hours after it "becomes obligated by oral or written agreement to make an independent expenditure in excess of $100 . . . ." The notice must include "a reasonable estimate of the anticipated amount."[17]

Because an "expenditure" is defined as a payment "for the purpose of influencing the nomination or election of a candidate," Minn. Stat. § 10A.01, subd. 10, the statute in effect requires notice and a reasonable estimate of anticipated

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[16] The Eighth Circuit held that the notice provision was not severable from the increased expenditure limit and public subsidy provisions and invalidated it for that reason. [App. at A14-15.]

[17] Violation of the statute is a gross misdemeanor, and subject to civil fines up to four times the amount "of which notice is required."

spending within 24 hours after a political fund becomes obligated to spend money to influence the election of a specific candidate. Given the vagaries of non-candidate spending by political funds such as MCCLCSPC, however, the determination of when (if at all) a political fund "becomes obligated" to spend money in support of or opposition to specific candidates is extremely difficult, if not impossible.

MCCLCSPC, for example, contracts for generic artwork with a graphic designer suitable for use in many races; customizes the artwork on its in-house desktop publishing to fit particular elections; changes the focus and targets of ads as information on election races is received; and contracts with printers for candidate-specific ads at unit prices based upon quantity estimates which frequently change with new information and its own limited resources.

Similarly, MCCLCSPC contracts for radio air time several weeks in advance of elections, and pays in advance, without having determined which specific candidates it will support or oppose, or whether it will actually use all the air time booked. Candidate-specific ads are developed later, as campaigns evolve, and again tentative decisions frequently change with developing campaign strategies and MCCLCSPC's resources.

In essence, a political fund may know with reasonable certainty when it has entered a contract, or has become obligated to spend money. It is far more difficult to determine when it has incurred obligations to spend money in support of or against specific candidates, and in what amount(s) it may be so obligated.

No person should be required to notify the Board and the candidates of the incurrence of obligations which may or may not ripen into "independent expenditures," and thereby trigger increased spending limits and public subsidies to opposed candidates, at the risk of being charged with criminal conduct for not having given earlier or more accurate predictions of campaign decisions before they are actually made. If this

Court grants the Petition, it is therefore likely to conclude that the notice provision is void-for-vagueness, and may not reach the merits of the issue the State seeks to present.

CONCLUSION

MCCLCSPC respectfully requests that the Petition be denied.

Date: January 5, 1995 Respectfully submitted,

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ATTORNEYS FOR RESPONDENT JACQUELINE A. SCHWIETZ, TREASURER, MINNESOTA CITIZENS CONCERNED FOR LIFE COMMITTEE FOR STATE PRO-LIFE CANDIDATES

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Affidavit of Frank J. Walz A-1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MINNESOTA CITIZENS CONCERNED FOR LIFE, INC.; JACQUELINE A. SCHWIETZ, individually and as Treasurer of MINNESOTA CITIZENS CONCERNED FOR LIFE COMMITTEE FOR STATE PRO-LIFE CANDIDATES; EILEEN ANGELL, MITCHELL HOYT UNRUH, and LORI ERICKSON,

Plaintiffs, Civil File No. 3-93-876

v.

VANNE OWENS HAYES, in her capacity as Chair of the STATE ETHICAL PRACTICES BOARD, and HUBERT H. HUMPHREY III, in his capacity as ATTORNEY GENERAL OF THE STATE OF MINNESOTA,

Defendants.

AFFIDAVIT OF FRANK J. WALZ

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

FRANK J. WALZ, being first duly sworn, upon oath deposes and says:

1. I am a member of the firm of Best & Flanagan, 4000 First Bank Place, 601 Second Avenue South, Minneapolis, Minnesota, and one of the attorneys for the Plaintiffs.

2. I have reviewed substantial portions of the legislative history of Senate File 25, Senate File 152, House File 163, and House File 201 which culminated in the adoption of House File 201 by the Minnesota Legislature as Chapter 318 of the 1993 Minnesota Session Laws. My review included a review of the all of the transcripts of tapes of committee meetings prepared by members of our support staff which are being submitted in conjunction with the Plaintiffs' motion for summary judgment; several additional transcripts prepared by our support staff not being submitted because their content is of no particular relevance to the issues here; the Affidavit of Nancy L. Helmich and accompanying transcript excerpts previously submitted by the Defendants; and a summary of portions of the legislative history of Chapter 318 prepared by Thomas Research.

3. Following is a brief chronology of the hearings leading up to the passage of the bill by the Legislature and its approval by the Governor, together with true and correct excerpts from the transcripts of committee meetings which relate to the independent expenditure restrictions and the $100 contribution limit to PACs being challenged by the Plaintiffs, and a brief identification of the subject matter or context of the legislative discussion.

4. Senator John Marty ("Marty") was the chief author of S.F. 25, known as the Marty bill, and later also became the chief author of H.F. 163 in the Senate. Representative Wally Sparby was the chief author of H.F. 163, the House version of what was originally known as the Common Cause proposal. S.F. 152 was the Senate version of the Common Cause proposal. The transcript excerpts which have been presented to the Court by the State with the Helmich Affidavit relate to the introduction of S.F. 152 and H.F. 163, the Common Cause proposal, and what it was intended to accomplish. While the Common Cause proposal, as originally presented, did contain a provision limiting contributions to "PACs", i.e., political committees or political funds, to $200, it contained no provisions restricting independent expenditures. The Marty bill, as originally proposed, contained provisions requiring notice of independent expenditures to the Ethical Practices Board and increasing the expenditure limits of candidates affected by independent expenditures, but contained no provision regarding public subsidies for affected candidates.

5. The concept of giving public subsidies to candidates against whom independent expenditures were made was introduced as an amendment to H.F. 163 by Representative Kathleen Blatz on March 8, 1993 [see ¶ 9, infra], and as an amendment to S.F. 25 by Senator Marty on March 9, 1993. (See ¶ 11, infra.] The Blatz amendment passed the House General Legislative, Veteran's Affairs and Elections Committee ("Elections Committee") on March 8 but was deleted by the House Committee on Economic Development, Infrastructure and Regulation Finance on March 15, 1993, and an amendment to reinstate the provision offered by Representative Blatz before the full House on April 7, 1993 failed. The Marty Amendment passed the Senate Ethics and Campaign Reform Committee ("Ethics Committee") and

survived proposed amendments to delete it in the Senate Finance Committee on April 7, and before the full Senate on April 20, 1993, the date of Senate passage of H.F. 163.

6. The Joint House/Senate Conference Committee deleted Marty's public subsidy provision from the bill on May 2, 1993, and rejected an offer by Senator Marty to reduce the matching public subsidy from 100% to 50% of an independent expenditure. The House and Senate then passed the Conference Committee bill, without the public subsidy match provision, but the bill was vetoed by Governor Carlson on May 11, 1993. (See ¶ 19, Ex. A., infra.]

7. On May 15, 1993, Senator Marty moved to amend H.F. 201 to substitute the Conference Committee report on H.F. 163, with the addition of a 50% public subsidy for candidates affected by independent expenditures. The amendment was adopted, the amended bill passed the Senate and the House, and was signed by Governor Carlson, with a line-item veto of an appropriation for an unrelated campaign subsidy, the so-called "third tier match" program. [See ¶ 20, Ex. B., infra.]

Independent Expenditure Restrictions

The following transcript excerpts relate to discussions of the independent expenditure provisions as they evolved to final passage in H.F. 201.

8. Prior to introducing the concept of a public subsidy for "victims" of independent expenditures, Senator Marty proposed an amendment to S.F. 25 which would have required a minimum of 21 days' notice prior to a primary or general election of an intent to make an independent expenditure. At the Ethics Committee meeting on March 4, 1993, the following colloquy occurred:

Senator Marty: Mr. Chairman, while it's being handed out I'll explain the amendment. This is one that I've heard from a lot of people

who I think have raised very legitimate concerns about the role of independent expenditures in a, when we are trying to set up a balanced campaign finance package that independent expenditures may be used in ways that significantly tilt the impact various groups may have on the process and this thing tries to address that in three ways. It does not, as we cannot constitutionally do, it does not try in any way to restrict people from making independent expenditures but as you know the bill already has several provisions related to these in it. One of which is that you must provide notice of any independent expenditures you are going to be making within 24 hours after you've become obligated by oral or written agreement to make that independent expenditure and then in response to that the candidate who is the victim, if you want to call it that, of an independent expenditure has their spending limit increased by the same amount that the independent expenditure organization reports to the Ethical Practices Board and to the campaigns. This goes further than that in three ways. First of all, and the first one is one that I recognize it's a free speech issue and I think the courts would recognize there's some issue near the end of a campaign, whether 21 days is the proper period or not, it would be simply saying you could make an independent expenditure after

that but you would have to give the notice at least 21 days before the primary or general election so if you were planning to make one before then you'd have to plan ahead so you could notify the other parties involved at least three weeks before an election.

Senator Luther: Senator Marty, do you think that, would that actually be constitutional to require a party to notify the Board 21 days ahead of time?

Senator Marty: Mr. Chairman, I discussed this at some length with Senate counsel and we recognized that this, I obviously, we put it down to a shorter period of time, say 14 days or something, there would be a, probably a greater probability that the court would recognize that it's not an undue burden for somebody. They could still make the expenditure after that but to provide the notice before this period of time. And certainly I would not doubt that there'd be a good chance this would be challenged and how the courts would rule is a good question. The point is not to stop anybody from making independent expenditures, which we cannot do, but simply to say if you're going to be doing it we have a fair chance so that the political debate can continue and if you want to make an independent expenditure affecting my campaign I have a chance to respond before the end and obviously if you have

no notice or notice coming the day before the election, two days before the election, you obviously have no chance to respond. So I recognize it might be challenged.

Senator Luther: I thought free speech just plain required that if you, the day before the election if you're a group out there and you want to do something and send out a flyer the day before the election I thought you just could do that. Senator Marty.

Senator Marty: Mr. Chairman, there's, I'm sure the argument would be made that you could and obviously whether 21 days is an appropriate amount of time, certainly this is one that I recognize would likely be challenged and I would hope that the court recognize that it's not an undue burden. It is a burden of some sort. You would have to plan ahead and tell people that you are planning to make an expenditure, but that it does not restrict you from making that expenditure on the last day or anything.

[Ratliff Aff., Ex. D, pp. 1-3.] Senator Marty subsequently withdrew the proposed amendment.

9. At a meeting of the House Elections Committee on March 8, 1993, Representative Blatz offered an amendment to H.F. 163 incorporating independent expenditure notice and increased expenditure-limit provisions and a public subsidy match provision for candidates affected by independent expenditures. In introducing the amendment, she said:

What the amendment would do, I think I need to back up here. What I'm concerned about is happening a little bit now and I believe will become more likely to happen in the future is that people have a constitutional right as do groups to make expenditures on behalf of candidates that they want to promote, but we're not supposed to know about it. So if I like Chris Hasskamp up there in Crosby and she's doing a good job I could get some of my friends together, they could each kick in, I don't think there's any limits of what they can kick in, and we could let's say get $10,000 on her behalf and maybe we don't like something about a different incumbent in that district and they could work against that challenger in representative Hasskamp's behalf. Now that can happen the last two weeks of the campaign. You don't have to know anything about it. They can do direct mail, media, whatever. And that is their constitutional rights. We can't deal with that or limit it or anything like that. But I do believe we can regulate it. What this amendment does is say that if you're going to make an independent expenditure on behalf of a candidate that's in excess of $100 that you have to notify the Ethical Practices Board thirty days prior to the election and just tell them that you're going to make this expenditure. And I hope that the language also says the amount. Then the Board, and you also have to notify the candidate, the one you're doing it on behalf of and the one that you're doing it not on behalf of, and then the spending limits for the person that is not being benefited would be increased by that same

amount and they would also be able to get that amount of money from public subsidy. This amendment does say at the very end on line 24 that they would be paid 30 days after they're notified that this expenditure would be made. I would say that it should coincide, I'd like that changed, if you're willing to support the amendment, to be when they do make the disbursements to the Ethical Practices Board. I really believe that most people sitting here or challengers or anybody in a district that's really up for grabs, that has a chance of going to either party needs this-legislation. It's just totally unfair to think that any group, and I don't care what side of the aisle, I don't care who the group is, can come in and do mass mailings in your district, buy a substantial media buy and you're sitting there adhering to the campaign limits, no notification. There's, I think even with this amendment you're still at a slight disadvantage because you have to all at once react. And you know how difficult it is to get your literature when you're on a schedule planning it let alone when you get a notice that someone's going to come in with $5,000 the last week or whatever. So I think it kind of levels off the playing field, to quote Representative Gutknecht before, and I hope that together if we have to clean up the language a little bit that's fine but that we can support it.

[Ratliff Affidavit, Ex. E, pp. 60-2.]

10. Later, in support of the Blatz amendment, Representative Gil Gutknecht said:

I appreciate the fact that the author is going to try to work on this language. It isn't perfect. But I think the concept is critically important because one of the things we're trying to do with this bill is to take away the influence of the PACs and the special interest. And what is going to happen is if it's more difficult for them to make direct contributions to our campaigns or our opponents campaigns we're going to see even more independent expenditures and it's like getting hit with a baseball bat in a dark room. It's going to happen when you don't see it coming. This language may not be perfect, but we've got to do something and it needs to be in this bill because if you take away the game on one side with PACs we're just going to see even more of the independent expenditures. And really I think, that that is the thing that is going to have the most profound and most negative impact on our whole election system, so I do hope that we'll get some kind of language like this into this bill because I think it's very important.

[Id., p. 70.] The Blatz amendment passed. [Id., p. 71.]

11. On the following day, March 9, at a Senate Ethics Committee meeting, Senator Marty offered an amendment to his bill similar to the Blatz amendment, granting a public subsidy to counter independent expenditures. He said:

[T]his addresses the issue of independent expenditures. I had a provision that I said as I introduced it that I thought it had a good chance of not making it through the courts, and after the committee discussion, I decided to withdraw that part of the amendment. What remains of this, I changed one part. As you can see the bill it amends page 8 beginning on line 5 of the bill that language that an independent expenditure you have to notify the candidates involved in the race. This would not, this would simply

add a penalty for failing to give that notice and then the language on lines 10 through 13 would say instead of the system that I proposed last Thursday, this would say that it would boost the public subsidy by the amount of the independent expenditure so if you were the victim of an independent expenditure to the tune of $4,000 not only would your limit go up by $4,000 but you would be eligible for the public subsidy of that amount, an additional public subsidy. This was offered in the House yesterday by Representative Blatz. This similar kind of language as that part, and it did pass unanimously. I would have proposed this the other day, except I thought its chances in the courts were not good and Senate Counsel suggested there are some very strong arguments for this. So, that's what the amendment does.

[Ratliff Aff., Ex. F, p. 1]

12. On April 17, 1993, at a meeting of the Senate Finance Committee, in a discussion of the public subsidy provision, Senator Morse raised a question as to whether situations might not arise in which an independent expenditure is made on behalf of a candidate who did not want it, or felt it was actually detrimental to him, and yet his opponent would get a public subsidy because of it. Senator Marty responded:

> [Y]es, I think this is a very legitimate concern and this is not a perfect response to independent expenditures. I think if I had my choice on how to do it, I would do it a lot differently but the U.S. Supreme Court, 8 votes to one in terms of limiting independent expenditures and what I would make the argument is, the people who feel so strongly that they have to have some say in the process, they are still are going to have their ability to, but I think a lot of independent expenditures that are made are frankly ones that people find are a way around contribution limits

or expenditure limits and they are doing it. A lot of groups that make endorsements made independent expenditures on behalf of the people they have endorsed.

* * *

But clearly it's not a perfect response. But I would make the suggestion that very, very few of those kind of independent expenditures are going to occur.

[Wilson Aff., Ex. 1, pp. 13-14.]

13. During the same meeting, a question was raised to Senator Marty as to why H.F. 163 proposed to restrict contributions by PACs to candidates but continued to allow independent expenditures. The following colloquy then occurred:

Senator Marty: Mr. Chairman, Senator Terwilliger, either --I mean it's basically PACs that are making those independent expenditures and if they choose to do that, because we cannot--we cannot constitutionally stop them from doing that or limit them from making those expenditures, but what we do in the bill I think is the next best thing, we allow the other side to be able to respond to it by giving them the limit of money to do it. And realistically I think this will accomplish the same ends without offending the court's interpretation of what first amendment rights are.

Senator Terwilliger: Mr. Chair, to follow up on this, it seems to me what we are really saying is that it is alright for a PAC to be able to exist but put the money through an independent expenditure because we want to be constitutionally correct with the court and then it's absolutely, as far as

I'm concerned, it's kind of driven under ground. What we are doing is, kind of ignoring and saying, well it's all right to have it over here but not over here. Because if it's both the same--both same types of organization, we're attempting to control them and we say we can't so, we're--because of the public pressure of people saying well PACs are bad, I don't agree that PACs are bad. I think there are a log of good government PACs out there. I don't think it's balanced to do it this way and I think in addition to that it gets--then it gets to the next question which is--all right so if someone makes an independent expenditure on the behalf of Senator Johnson or me then our opponent gets to have that like amount put into their account. That comes to the expense of the taxpayer and I say wait a minute, I don't quite understand Mr. Chair why we should control one half of the equation without the other and then in the process drive up the federal--the state expenditure level.

Senator Marty: Mr. Chairman, I think the way it would work in practice, we would be controlling both. If I am the Marty PAC and I--whatever interest I represent, I want to give money to your campaign or everybody in this room's campaign, I can do that right now up to $1500.00. And under this bill, no you couldn't do that anymore. Supposing I'm a big PAC and I've done that in the past and everyone of you got $1500 and then on top of that if you turn around and make an independent expenditure of $5,000 additional on your behalf. What we are doing under this bill is stop the first one that's no problem to stop, we

> can do that it's a condition of public financing, we do that, then okay now instead of giving $5000 independent expenditures to everyone of you, I'm going to give $6500 in independent expenditures to everyone, that can happen under current law anyway. But realistically what's happening here, is we're saying, look if you really want to make the expenditure, you are allowed to make that expenditure. But my PAC just has to do that and presumably I don't have money coming out of my ears and just don't know what else to do with it, so it's not the easiest thing in the world for me to do that, but I believe it's worth my while to make that expenditure, then by having this counter that the bill has, I think realistically in most cases, I'm going to say, look you mean, the person I'm trying to fight, your opponent is going to be able to get that same $6500. I'm going to say forget it, I'm not going to make the expenditure.

[Id., pp. 16-17.]

14. Senator Ranum then asked Marty what the "penalty" would be for a "last minute" independent expenditure. Senator Marty responded:

> There is no penalty, we are not allowed to restrict them, what we do instead is--if I make an expenditure on the behalf of your opponent, I have to report--not when--when I agree to make one, that means I talk to a printer and I want you to print this brochure, you get notified of that. Your limit goes up by that amount, your public financing goes up by that amount. You then know that I was going to make--I was going to spend $10,000 on your opponent's behalf, wherever it came from in my PAC, however, I raise that money, I'm going to spend

> $10,000 on you opponent, you get $10,000 public money to counter that. You didn't have to fight to raise it, you didn't have any trouble raising it, you got it and realistically that's my response to Senator Terwilliger, I'm not going to make that expenditure because I'm not stupid.

[Id., p. 18.]

15. Later in the meeting, a motion was made to delete the provision granting public subsidies in response to independent expenditures. Senator Marty opposed the motion, as follows:

> Mr. Chairman I strongly oppose the motion. Let me give an example of why I think this would do real harm to the bill. We got, given the gubernatorial race for instance, we have a spending limit of 1-1/2 million dollars, we can raise it from anything other than contributions of $1,000 or less for individuals. Some group decides that because they don't like the fact that they can't any longer give any money to candidate for Governor or in a, somebody for that race, they decide they want to spend $200,000 in attack ads against the candidate for Governor in the race and that we're supposed, if this language was taken out, we'd effectively be saying to the other side, well ya know you'll get, have your chance to respond, we're going to tell you about it and you may know even a week and a half before the election. Now if you can go out and raise contributions of 1,000 bucks or less and you can raise that 200,000 bucks, in the next week and a half, and then you can design your own ads to respond to it, then you'll have the chance to respond to it. And instead of having 371,000 independent expenditures as we have had two years ago, or last year, we're going to have ten times that. I think it effectively would gut the bill. I mean I think if we're going to allow people to make unchallenged

independent expenditures, which you wold doing through this, I think you are going to have them sky rocket. I think if we leave this in the bill, what we're going to have is, is only the independent expenditures where somebody feels so much that something's missing from the debate, that they are going to use their, exercise their free speech rights. Everybody who's just using this as a loop hole around the contributions limits, is going to use it, is going to stop doing it if we have this language in the bill, but take that out and people are just going to use it as a big loop hole in the bill.

[Id., p. 39] The motion ultimately failed.

16. On April 20, 1993, H.F. 163 was considered by the full Senate. Early in the discussion, Senator Berg described independent expenditures made late in a previous campaign by MEA IMPACE and asked Senator Marty "in this bill of yours what provisions do you have to eliminate those independent expenditures and how is the opposing candidate going to compete." The following colloquy then occurred:

Senator Marty: Mr. President, Senator Berg, you raised a good question. Again I don't know specifics about any particular group's actions in terms of independent expenditures, but I agree. I think it's a very big problem now and it will remain a big problem. This bill I think does everything we can constitutionally do to address independent expenditures and I think it will do a tremendous job at addressing that problem. Basically what the bill would require of somebody who's making an independent expenditure on behalf of a candidate or in opposition to a candidate would be to disclose that they are making such an expenditure and how much they are expending on it not the day they make it but the day they become obligated to do so so in other words if somebody

goes to a printer or a newspaper and says I want to run this ad or run this brochure the day they obligate themselves to make it it would be due so you have some advance notice and then based on that advance notice the Ethical Practices Board would increase your spending limit by the amount of the money that the independent expenditure was being made for and you would receive additional public finance money to counter _____ the ability to respond to it and the money to do so.

Mr. President:

President: Senator Berg.

Senator Berg: Would Senator Marty yield further.

He'll yield.

Senator Berg: Senator Marty, under the court's decision I realize that they ruled that a person may make independent expenditures because this is the right of free speech. But have they also ruled that an organization has the right to make independent expenditures on behalf of some candidate and that this is also permissible? or could we ban organizations from using that method of financing or influencing these campaigns?

Senator Marty: Mr. President, Senator Berg, no, the court has made it pretty clear that it doesn't have to be just on an issue or something they can a group can make independent expenditures on behalf of a campaign or in opposition to a campaign. There is virtually nothing that can be said or done about that. Again, as I said, you've got kind of a perhaps some member of the finance committee referred to it as a mutually assured destruction kind of thing. If you give the other side the ability to counter it very easily

a lot of people are going to think twice about whether they really want to make those independent expenditures and as you pointed out it is a very big problem and if we don't address it it's pretty worthless to spend our time trying to tighten up on other restrictions and so on if everyone's just going to make a loophole and go around it which is why I think that's a very important provision in the bill.

[Ratliff Aff., Ex. G, pp. 3-4.]

17. Later in the discussion, the following colloquy occurred between Senators Bertram and Marty:

Senator Bertram: Mr. Chairman. Senator Marty, I had a question I wanted to ask Senator Marty if he'll yield. I would like to ask you Senator Marty relating to the individual political fund and I'd like to talk a bit about the independent expenditures and in the bill relating to the notifying of candidates, the Ethical Practices Board within 24 hours of making or becoming obligated to make an independent expenditure. And if you'll look in the bill, Senator Marty, I don't know what your purpose was but maybe you could explain it. You know [a] candidates campaign expenditures limit would increase by the amount of the independent expenditure and I'm sure you had some reason of doing that, but as I understand it and Senator Luther who is an attorney or others around you who are could probably better explain this than I can, but as I understand it that independent expenditures have been upheld by the courts and they are protected speech under the First Amendment so I understand they cannot be restricted. So Senator Marty, I would like to know why this is a part of this legislation when you know what the courts already have indicated and yet this penalizes a candidate who

has no control over the independent expenditures and maybe you can elaborate a bit on that.

Senator Marty: Mr. President, Senator Bertram. Yes, this bill does not stop, as you suggested, independent expenditures. And as you also correctly said the courts have said we cannot stop them. So we are not inconsistent with the court there. What this would do would be allow some candidate who is the unfair victim of some sort of, fair or unfair, they're the victim of a massive independent expenditure against them, Senator Berg has given us one example of a case against him, would give him the chance to respond. It doesn't stop them in any way from doing it. They may or may not choose to continue making independent expenditures, but it would give him the chance to respond. It gives candidates the ability to counter these things and get their own message out. It's not a perfect solution, but it does get a chance to respond.

[Id., p. 33.]

18. Senator Betram then moved to delete the independent expenditure provisions from the bill. In opposing the amendment, Senator Marty said:

Mr. President, Senator Bertram. You are correct, I do strongly oppose the A52 amendment and when you suggest legislation that looks good and doesn't really do anything, if you put this in this bill will do a lot more of look good than do things because frankly all the PACS and others who the bill would restrict from giving to campaigns might just turn around and decide well we can get around these contribution limits, we can get around the expenditure limits simply by making independent expenditures. And this amendment would facilitate their

doing that. As Senator Berg's pointed out and numerous others have, these independent expenditures are already out there and they're out there in fairly sizeable numbers. If people, there is, however, no limit on them in this. They are still allowed to continue it, to address the Supreme Court's concerns, it simply gives the other side the chance to respond. And what the court is looking for is free speech. This doesn't stop anybody from their right to free speech. It simply says we are going to have an informed debate and the other side is going to have the ability to respond as well. As far as an open appropriation and so on for this, basically what's going to happen is a lot of groups are going to decide we're not going to try and use this as a loophole around the limits because frankly the other side's going to get the money handed to them and they're going to be able to counter it and therefore maybe we don't really want to use our hard earned money on that purpose. And so the people who are trying not to get some new message out but who are trying to simply use it as a loophole around the limits are going to decide maybe it's not worth doing. Your amendment would cause the problems that you say that we can't deal with. We could give people the ability to respond to these attacks. We do that in the bill. I think it's carefully drafted. I think it would stand up in court. You're right, it probably will be challenged, but I think it will stand up in court. And I think it's a reasonable provision and if we take this out then we get to the position where we're just doing feel good legislation which people can get around it very simply.

[Id., pp. 35-36.] Senator Betram's motion failed on a roll call vote, and the bill passed the Senate.

19. As previously, indicated, the public subsidy provision was initially deleted from the bill by the Conference

Committee, and the bill passed both the House and Senate without it but was vetoed by the Governor. In his veto message, Governor Carlson said:

> The Legislature's failure in House File 163 to create a means by which a candidate can respond to being targeted by special interest independent expenditures has resulted in a campaign finance system that is an unconstitutional violation of a candidate's right to free speech. Pursuant to both House File 163 and current law, a candidate must agree to abide by expenditure limits and receive public subsidies on or before September 1 preceding the General Election. However, once a candidate files an agreement to be bound by the expenditure limits, he or she is locked into those expenditure limits. As a result, the candidate cannot respond to special interest independent expenditures directly targeted against the candidate prior to a post-September 1 Primary or the General Election. The failure of House File 163 to provide a candidate who agrees to public subsidy relief from expenditure limits after being targeted by special interest independent expenditures is unconstitutional as a violation of that candidate's freedom of speech.
>
> A targeted candidate must be provided the opportunity to publicly debate and contest the contents of independent expenditure attacks. The right is protected by and embodied in the free speech clause of the First Amendment to the United States Constitution and is the essence of good government. The United States Supreme Court has so mandated in a ruling in which it stated that the central purpose of that clause is "to assure a society in which 'uninhibited, robust and wide open, public debate concerning matters of public interest would thrive for only in such a society can a healthy representative democracy flourish." A system such as Minnesota's, embodied in

House File 163, which denies a candidate the right to exceed expenditure limits in order to engage in an uninhibited wide-open public debate of the issues raised by independent expenditures is both unconstitutional and contrary to sound public policy.

[A copy of the Governor's veto message is attached as Exhibit A. The quoted material appears on page 2.]

20. Senator Marty subsequently moved to amend the bill (to its present form) by providing a 50% public subsidy to candidates affected by independent expenditures; the amendment and the bill passed; and the Governor approved the bill, subject to an unrelated line-item veto. [A copy of the Governor's approval letter and line-item veto message is attached as Exhibit B.]

$100 Limitation on Contributions to PACS

The following transcript excerpts relate to discussions of the provision of H.F. 201, as finally enacted, which prohibits political committees or political funds from accepting aggregate annual contributions in excess of $100. [Minn. Stat. § 10A.27, subd. 12.]

21. On January 26, 1993, at a meeting of the Senate Ethics Committee, Senator Marty explained the $100 contribution limit of his bill as follows:[1]

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[1] At the time of this discussion, Senator's Marty bill contained a provision prohibiting all contributions by PACs to candidates who agreed to abide by spending limits. That provision was later deleted in favor of what is now Minn. Stat. § 10A.27, subd. 11, which prohibits candidates from accepting contributions from PACs and large contributors which aggregate more than 20% of the candidate's spending limits.

> Section 21 is the ban on contributions to PACs. This is one that I had in my bill as I've been working on it in the past several months I took it out because of the belief it probably would not stand the court challenge, then I saw several other proposals that felt it might withstand the court challenge so I put it back in. That would be a limitation on any contributions to a PAC of more than $100 a year. Why do we need this if we're banning PAC contributions to candidates? It's simply back to the independent expenditure issue. Again, as I said, there's some question of whether the courts would uphold this section, but I think it's again very important that we do look at the independent expenditure portion of things because I think it has been used in many ways as a loophole around spending limits.

[Ratliff Aff., Ex. A, p. 15.]

22. On February 11, 1993, at a meeting of the Senate Ethics Committee, Senator Marty further explained the $100 limit as follows:

> Again in this bill you could not give any PAC, no PAC could give money to a candidate anyway. I think that this is very helpful though in terms of addressing some people trying to use it as a loophole in the spending limits through independent expenditures. If we're going to have a policy that $100 is the maximum contribution, it seems to me that's appropriate there too. And again, the only purpose people can use these things for would be independent expenditures under this proposal.

[Ratliff Aff. Ex. C. p. 12.]

23. On March 8, 1993, at a meeting of the House Elections Committee, a representative of Common Cause, Tom Berg, was asked by Representative Gutknecht whether

the committee which formulated the Common Cause proposal had considered what could be done to limit the impact of independent expenditures. The following colloquy then occurred:

Berg: Mr. Chairman, I'll be very brief. My name is Tom Berg. I was chair of the committee that developed the legislation that Representative Sparby has. We did talk about that, excuse me, and shared your concern about that problem. That's one reason we did what we did in terms of PACs, left them in there but put the clamps down on them to try not to funnel more money into basically uncontrolled independent expenditures. That's why I think this bill is much better than the bill that Senator Marty has.

Chair: Representative Gutknecht, briefly.

Gutknecht: Mr. Chairman, Mr. Berg. Could you just, how does this do it better than Marty's bill? I mean let's say a group wants to spend $40,000 to defeat Mr. Abrams.

?: Good luck.

Chair: Mr. Berg.

Berg: We basically viewed it as, Mr. Chairman, I won't get into the details of representative Abrams election contest, but the way we approached it was is pretty much a zero sum game in politics and money and if you take it out over here it's gonna somehow pop up over here. And what you want to do is make sure you have good accountability for all of that money no matter where it goes. And what we did was saying that people have shown over the last 15, 20 years they want to participate in PACs. PACs are a

legitimate way to contribute money. The problem is they have given, they have been given or achieved arguably a too great a percentage of the amount they can give so they get too much muscle. So what we did was lower the amount you can give to a PAC, lower the amount that candidates can receive from PACs, lobbyists and big givers to reduce that special interest, if you will, from them but still allow it to happen but require full disclosure. And so you can report it better here, whereas as I understand Senator Marty's bill they totally eliminate that and our thought then will be all of that PAC money will go to what you're concerned about and we were concerned about of independent expenditures which are not disclosed as well and controlled as well under the existing law. That's why I think this bill is much better in terms of dealing with independent expenditures than the legislation that Senator Marty has proposed.

[Ratliff Aff., Ex. E, pp. 39-40.]

24. On April 20, 1993, on the Senate floor, Senator Marty was asked about the section of the bill restricting contributions to PACs. The following colloquy then occurred:

Senator Marty: Mr. President, Senator Finn, section 27 would limit the amount of contributions an individual can give to a political committee or fund.

Senator Finn: Mr. President, Senator, so I'm not sure what these political committee and funds are, you've excluded the candidate's principal campaign committee but you're apparently restricting individuals from contributing more than $50 per year. Wouldn't that be an impairment of their rights to free speech and freedom to associate and things like that

unless you've got some other kicker here that I'm not finding.

Senator Marty: Mr. President, Senator Finn, this one may be, this was both a provision in my bill and the Common Cause bill and it's one that may well be challenged. The courts have accepted contribution limits to candidates and I don't know that they've spoken specifically on the concept of limiting them to PACS.\

[Ratliff Aff., Ex. G, p. 9.] The bill ultimately passed with a $100 annual limit on contributions to PACs.

/s/ Frank J. Walz
FRANK J. WALZ

Subscribed and sworn to before
me on February 23, 1994.

/s/ Caryn S. Glover
Notary Public

STATE OF MINNESOTA
OFFICE OF THE GOVERNOR
130 STATE CAPITOL
SAINT PAUL 55155

May 11, 1993

The Honorable Dee Long
Speaker of the House
Minnesota House of Representatives
463 State Office Building
Saint Paul, Minnesota 55155

Dear Speaker Long:

I have vetoed and am returning Chapter 173, House File 163, a bill relating to campaign reform.

I am committed to, and the people of Minnesota are demanding, comprehensive electoral and ethical practices reform. I am vetoing House File 163 not to engage in debate or combat with the Minnesota Legislature. I am vetoing House File 163 because this legislation is bad for the people of Minnesota and unhealthy for all of us who believe in a democratic elective process. The objections I hold are non-partisan. The objections I hold have been answered in a federal campaign reform proposal which has been endorsed by President Clinton. Why should I accept less for the people of this state than the President is willing to accept for the people of this nation?

As I informed the legislature approximately six weeks ago, I expect any reform bill to include certain goals and principles. I have reviewed House File 163 in the light of those goals and

principles. I have also reviewed the bill as a whole to see how the provisions relate to each other and to assess its overall impact upon Minnesota's electoral process.

House File 163 has some good provisions which include the dissolution of "Friends of" committees, the elimination of transfers among candidates' campaign committees, the lowering of contribution limits, and the elimination of public subsidies for unopposed candidates. However, when viewed as a whole, assessing the overall impact of the bill, it is clear that House File 163 does not achieve comprehensive reform. There are some who will argue that a bill that reforms even a little is worthy of becoming law, following the old cliche that half a loaf is better than none at all. I must tell the people of this state that in this case, the half-loaf is moldy. This bill worsens the existing electoral process by giving the special interests who already hold undue influence, even more power than before.

The disproportionate influence of special interest groups upon Minnesota's electoral process is one of the chief problems that must be effectively addressed in any comprehensive electoral reform package. House File 163, unfortunately, empowers special interests at the expense of individual contributors and voters. By failing to provide for any response to special interest independent expenditures, and failing to ban PACs or PAC contributions while simultaneously seriously reducing individual contribution limits and establishing a low 20 percent aggregate contribution for PACs, lobbyists, and large individual contributors, the Legislature has handed over to the special interest groups the ability to control Minnesota elections. The net effect of these inter-related provisions is to drive special interest contributions from the area of regulated PAC contributions to the area of unregulated independent expenditures. It is an arrogant abuse of power marked by a

process that excluded compromise. I refuse to sign any bill that permits special interests to control Minnesota's electoral process.

The Legislature's failure in House File 163 to create a means by which a candidate can respond to being targeted by special interest independent expenditures has resulted in a campaign finance system that is an unconstitutional violation of a candidate's right to free speech. Pursuant to both House File 163 and current law, a candidate must agree to abide by expenditure limits and receive public subsidies on or before September 1 preceding the General Election. However, once a candidate files an agreement to be bound by the expenditure limits, he or she is locked into those expenditure limits. As a result, the candidate cannot respond to special interest independent expenditures directly targeted against that candidate prior to a post-September 1 Primary or the General Election. The failure of House File 163 to provide a candidate who agrees to public subsidy relief from expenditure limits after being targeted by special interest independent expenditures is unconstitutional as a violation of that candidate's freedom of speech.

A targeted candidate must be provided the opportunity to publicly debate and contest the contents of independent expenditure attacks. This right is protected by and embodied in the free speech clause of the First Amendment to the United States Constitution and is the essence of good government. The United States Supreme Court has so mandated in a ruling in which it stated that the central purpose of that clause is "to assure a society in which 'uninhibited, robust and wide open' public debate concerning matters of public interest would thrive for only in such a society can a healthy representative democracy flourish." A system such as Minnesota's, embodied in House File 163, which denies a candidate the right to

exceed expenditure limits in order to engage in an uninhibited wide-open public debate of the issues raised by independent expenditures is both unconstitutional and contrary to sound public policy.

The mere providing of notice as incorporated in House File 163 does not remedy the unconstitutional failure to provide a targeted candidate a means to respond to a special interest independent expenditure. Moreover, the notice provided in House File 163 is wholly inadequate to provide effective notice or protect against fraudulent notice.

House File 163 also fails to achieve the goal and principle of restoring integrity and parity in Minnesota's electoral process. The bill fails to provide a "level playing field" for both incumbents and challengers, for candidates of all parties plus independent candidates, and for all persons and groups who wish to express their political views in a lawful manner.

House File 163 has significant elements which provide protection for incumbents, These elements include the failure to provide pre-Primary public subsidies and the establishment of high threshold contribution amounts to be raised with low ($50 or less) contributions in order to be eligible for public subsidy. These features are unrealistic for challengers, especially when multiple challengers exist in the pre-Primary stage, and create significant advantages for incumbents.

House File 163 also creates a significant unfair advantage to candidates of major parties at the expense of independent or third-party candidates. This bias is evident in the areas such as qualification for check-off dollar public subsidies, denial of pre-Primary public subsidies, continued allowance of PAC contributions, and access to enhanced public subsidies

following an opponent's decision not to abide by spending limits.

Finally, I wish to note two areas of concern which I would like to see addressed either directly in House File 163 or as a companion to this bill. As I have travelled across our state, I have heard from citizens innumerable times the request for an opportunity to consider term limits for elected officials. I wholeheartedly endorse a referendum for term limits because I truly believe the heart of any campaign reform must deal with the temptations of protecting incumbency.

I also feel the people of this state deserve a Minnesota Legislature that does not exempt itself from the rules it promulgates for others. I believe no legislation that is called reform in any respect can omit the reference to ethics reform.

For these omissions and the concerns I have highlighted above, I am vetoing and returning to you this bill. I do so very regretfully on behalf of the citizens of this state who want and deserve elected officials who serve only for the greater good.

Because of my commitment to reform, I am unwilling to veto and return this bill to you and rely solely upon the Legislature to design a true electoral reform package. Therefore, I am today announcing that I will be appointing a bi-partisan electoral reform commission to design a true comprehensive multi-faceted electoral reform package. In order to avoid the partisanship which infected House File 163, current elected officials and officials of political parties will not be members of the commission but will be invited to offer testimony and input. It is my hope that such a commission will incorporate the good aspects of House File 163 while addressing those problems that remain, including those set forth above.

Warmest regards,

/s/ Arne H. Carlson
ARNE H. CARLSON
Governor

c: Senator Alan Spear, President of the Senate
Senator Roger Moe, Majority Leader
Senator Dean Johnson, Minority Leader
Representative Steve Sviggum, Minority Leader
Representative Wally Sparby
Senator John Marty
Mr. Patrick E, Flahaven, Secretary of the Senate
Mr. Edward A. Burdick, Chief Clerk of the House
Ms. Joan Anderson Growe, Secretary of State

VETO MESSAGE

Chapter 318, article 2, section 37, subdivision 3(b)

Dear Speaker Long:

It is my honor to inform you that I have received, approved, signed and deposited in the Office of the Secretary of State Chapter 318, House File 201 (with the exception of Article 2, Section 37, subdivision 3(b) on Page 22, Lines 7 and 8).

I have line-item vetoed the open appropriation for the third-tier match program. House File 201 distorts Common Cause's match proposal by eliminating the requirement that private matching funds be raised from within a candidate's district. Also, in reality this program would result in a 2:1 public/private match, since the political contribution refund also applies to the private matching funds.

The match program would require that an additional $1.6 to $3.5 million of public funds be paid to politicians. While additional public subsidy may be justified to discourage independent expenditures by special interests, the third-tier match is an unnecessary hand-out. The public would be outraged at this abuse of public funds.

Despite its shortcomings, this bill represents the beginning of campaign reform. The dissolution of "Friends of" committees, elimination of transfers, reduction in contribution limits, and elimination of public subsidies for unopposed candidates are encouraging first steps. The mechanism for dealing with independent expenditures and the aggregate limit on PAC contributions are incomplete solutions, and many critical elements, including term limits and ethics reform, have been

totally ignored. Accordingly, I will proceed with the bi-partisan electoral reform commission that I previously announced, and I look forward to your support in these efforts to achieve complete campaign and ethics reform.

Warmest regards,
Arne H. Carlson
Governor

FILE COPY

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No. 94-983

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN L. HOLAHAN, JR., in his official capacity as Chair of the Minnesota Ethical Practices Board; HUBERT H. HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,
Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE COMMON CAUSE AND COMMON CAUSE MINNESOTA IN SUPPORT OF PETITIONERS

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January 4, 1995

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IN THE

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JOHN L. HOLAHAN, JR., in his official capacity as Chair of the Minnesota Ethical Practices Board; HUBERT H. HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,

Petitioners,

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICI CURIAE COMMON CAUSE AND COMMON CAUSE MINNESOTA IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI CURIAE

Common Cause is a non-profit, non-partisan membership corporation organized under the laws of the District of Columbia.[1] Its principal objective is to further the interests of its 250,000 members in honest and responsible government. Common Cause Minnesota is the state affiliate of Common Cause. Common Cause and its affiliates seek to promote these interests through reform of government and the political process.

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[1] All parties to this case have consented to the filing of this brief. Copies of the written consents of the parties are on file with the Clerk of the Court.

Common Cause has a longstanding interest in campaign finance reform. Common Cause has participated, as either a party or as *amicus curiae*, in many of the campaign finance cases before this Court over the last twenty years.[2] Common Cause has also actively supported campaign finance reform legislation at the state and federal levels. Representatives of Common Cause Minnesota were part of a broad-based task force that helped draft the Minnesota Ethics in Government Act, the legislation at issue in this case.[3] Common Cause state affiliates have also actively supported campaign finance reform in other states, including at least twelve states which have enacted comprehensive voluntary public campaign financing schemes. In addition, Common Cause has participated in drafting and promoting federal legislation containing provisions comparable in substance to those under review here. The decision of the Eighth Circuit, if permitted to stand, may imperil some or all of this legislation by casting doubts as to the legality of provisions integral to viable and effective public financing mechanisms.

BACKGROUND

Since this Court broadly endorsed voluntary public financing in *Buckley v. Valeo*, 424 U.S. 1 (1976), the states, as well as Congress, have grappled with how to structure viable and effective public financing programs. These reform efforts have been induced by concerns of compelling constitutional dimensions.

First, reform has been fueled, in large part, by concern over the corrupting effects of money on politics. The

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[2] *See, e.g., Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981); *Buckley v. Valeo*, 424 U.S. 1 (1976).

[3] *See* Petition for a Writ of Certiorari of John L. Holahan *et al.* at 5 [hereinafter "Petition for a Writ of Certiorari"].

House report on H.R. 3 observed that "[i]f there is one overriding goal of this legislation, it is to restrain the power of money as a force in our political process and as a determinant of its outcomes." H. R. Rep. No. 375, 103d Cong., 1st Sess. 30 (1993). This view reflects a widespread belief among legislatures that contributions, especially large contributions, create implicit or explicit *quid pro quos* between the contributor and the candidate.[4] As Senator Dale Bumpers of Arkansas recently lamented, "bill after bill has been defeated in this body because of campaign money." 139 Cong. Rec. S7187 (daily ed. June 15, 1993) (statement of Sen. Bumpers). "[O]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27.

Second, actual and apparent *quid pro quos* have caused widespread public cynicism concerning the electoral process. For example, a 1992 poll revealed that 74% of registered likely voters agreed that "Congress is largely owned by the special-interest groups," 83% agreed that the "[s]pecial-interest groups [that give campaign contributions to candidates] have more influence [over the government] than the voters," and 85% agreed that

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[4] For instance, many industry political action committees (PACs) give overwhelmingly to incumbents who sit on committees that have jurisdiction over their interests. These contributions are frequently made without reference to party affiliation, ideology, or other factors that influence contributions.

> Dairy industry committees, for instance, fund incumbents of both parties, with special attention to members who sit on congressional committees dealing with agriculture. They contribute seven dollars to incumbents for every dollar to challengers but do not hesitate to supply money to both an incumbent and challenger if it appears that the latter might win.

Gary C. Jacobson, *Money in Congressional Elections* 77 (1980). *See also* Philip M. Stern, *The Best Congress Money Can Buy* 47 (1988).

"[s]pecial interest money buys the loyalty of candidates." [5] This weakening of the democratic commitment implicates important government interests. The corrosive effect of public cynicism is reflected in low voter participation, a pervading sense of disenfranchisement from the political system, and a corresponding lack of faith in the democratic process.

Third, the creation of comprehensive campaign financing systems reflects legislative concern over skyrocketing campaign costs. Since 1976, "[s]pending in Senate races has increased more than five-fold, from a total of $38.1 million in the 1976 election cycle to a total of $210.8 million in the 1992 elections." [6] Similarly, the average cost of winning a House seat has tripled in the last 12 years—escalating from $178,000 in 1980 to $554,000 in 1992,[7] and the cost of campaigning rose an additional 18% for the 1994 House and Senate elections.[8] While

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[5] Gordon S. Black & Benjamin D. Black, *The Politics of American Discontent* 179 (1994) (Table 1). This sentiment was also well expressed in a report cited by the House report on H.R. 3:

> People believe two forces have corrupted democracy. The first is that lobbyists have replaced representatives as the primary political actors. The other force, seen as more pernicious, is that campaign contributions seem to determine political outcomes more than voting. No accusation cuts deeper because when money and privilege replace votes, the social contract underlying the political system is abrogated. Influenced by this widespread perception, people decided that voting doesn't really count anymore, so why bother?

H.R. Rep. No. 375, 103d Cong., 1st Sess. 30 (1993) (quoting *Citizens and Politics: A View from Main Street*, prepared for the Kettering Foundation by the Harwood Group (June 1991)).

[6] Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1132 (1994) (footnote omitted). Mr. Wertheimer and Ms. Manes are officers of Common Cause.

[7] H.R. Rep. No. 375, 103d Cong., 1st Sess. 30 (1993).

[8] *See* Charles R. Babcock, *Congressional Campaign Spending Up 18% Since 1992*, Wash. Post, Nov. 6, 1994, at A34.

the data is most readily available on campaigns for federal office, costs for campaigning for state offices have increased substantially as well over the last two decades.[9] The cost of running for office has been driven upwards not only by the direct investments of the candidates, but also by the rapid growth in independent expenditures. In 1976, independent expenditures in all federal elections amounted to only $2,033,207.[10] By 1984, independent expenditures had leaped by over 1100% to $23,434,380.[11]

The staggering costs of electioneering have forced candidates to make enormous commitments to fundraising efforts, thereby reducing the time they can commit to debate on issues of public concern.[12] Moreover, the increased cost of running for office has effectively excluded potential candidates from entering races, limiting voters' choices.[13]. "[T]he cost of running for statewide offices and

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[9] *See* Neb. Rev. Stat. § 32-1602 (1993) (citing a dramatic increase in spending for state office).

[10] Joseph E. Cantor, Congressional Research Service, *Campaign Financing in Federal Elections: A Guide to the Law and Its Operation* 73 (1993) (Table 18).

[11] *Id.*

[12] *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). *See also* Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 Colum. L. Rev. 1160, 1169-70 (1994) ("the time that elected officials spend raising money is always time away from the serious business of governing and almost always time away from soliciting the ideas and views of ordinary citizens"); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1281 & n.1 (1994); Dan Clawson *et al., Money Talks: Corporate PACs and Political Influence* 7-9 (1992); Frank J. Sorauf, *Money in American Elections* 183-84 (1988).

[13] The Florida legislature noted similar concerns:

> the costs of running an effective campaign for statewide office have reached a level which tends to discourage persons from becoming candidates and to limit the persons who run for such office to those who are independently wealthy, who are sup-

legislative seats has risen greatly[;] . . . many qualified candidates are excluded from the democratic system as a result of such rising cost." Neb. Rev. Stat. § 32-1602 (1993).[14]

In 1993, the Minnesota legislature, responding to these concerns and acting on recommendations provided by a broad-based task force comprised of legislators, lobbyists, professionals from the Ethical Practice Board, and representatives of numerous public service organizations, enacted extensive amendments to the Minnesota Ethics in Government Act. The Amendments substantially broadened Minnesota's public financing system, which provided for, *inter alia*, public subsidies to candidates who agree to certain expenditure and reporting restrictions.[15] In order to provide a workable alternative to private financing of elections and to ensure adequate public debate from differing viewpoints, the legislature provided that, if a nonparticipating candidate made an expenditure in excess of a predetermined amount or if an independent expenditure was made that expressly advocates the defeat of a participating candidate or the election of his or her opponent, the spending limits on the participating candidate would be raised and the candidate would be entitled to an additional public subsidy. Minn. Stat. Ann. §§ 10A.25(10b), 10A.25(13) (West 1994). After the District Court found these statutory provisions relating to

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ported by political committees representing special interests which are able to generate substantial campaign contributions, or who must appeal to special interest groups for campaign contributions.

Fla. Stat. Ann. § 106.31 (West 1992).

[14] *See also* John Harwood, *Political Treadmill: For California Senator, Fund Raising Becomes Overwhelming Burden*, Wall St. J., Mar. 2, 1994, at A1 ("[the pressure to raise money] squeezes out potential competitors who can't keep the financial pace").

[15] Minnesota first enacted a public financing system in 1974. Act of April 12, 1974, ch. 470, §§ 30-32. The Act was amended in 1976 to conform to the rules set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976).

independent expenditures to be constitutional,[16] the Court of Appeals for the Eighth Circuit reversed, concluding that the statute violated the First Amendment.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT WITHIN THE CIRCUITS AS TO THE APPLICABILITY OF THE FIRST AMENDMENT TO PUBLIC CAMPAIGN FINANCING LAWS

The Court should grant the Petition for a Writ of Certiorari to resolve a conflict between the decision of the Court of Appeals in this case and the decision of the First Circuit in *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993). The conflicting opinions of the Circuits have created substantial uncertainties for Congress as it attempts to draft appropriate and constitutional campaign finance reform legislation and for the state legislatures and city councils currently considering how to structure voluntary public financing programs that present an attractive alternative to public campaign financing.

In *Vote Choice*, the First Circuit considered the constitutionality under the First Amendment of the Rhode Island campaign finance law.[17] In 1992, the Rhode Island General Assembly enacted a comprehensive public financing system for its gubernatorial candidates. The program provided matching funds for up to a maximum of $750,000 per candidate and required participants to observe certain restrictions on campaign spending and related activities. To make the option of public financing

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[16] None of the parties to this matter challenged the portion of the statute that provides additional funds (and a higher expenditure limit) when the spending of nonparticipating candidates exceeds the program's limits.

[17] Common Cause and Common Cause Rhode Island appeared as *amici curiae* in the *Vote Choice* litigation.

more attractive to candidates and thereby increase participation in the system, the 1992 act provided for a "contribution cap gap." *See* 4 F.3d at 30. Under the preexisting statutory scheme, a candidate was entitled to receive contributions of up to $1,000 from any person or political action committee in a calendar year. The 1992 public financing amendments retained the $1,000 limit for those candidates who chose not to enter the financing system and doubled the limit to $2,000 for candidates who choose to accept the benefits and restrictions of public financing. Participating candidates were entitled to matching funds of up to $2,000 per contributor.

Two Political Action Committees (Vote Choice and Gun Owners PAC), as well as the Rhode Island affiliate of the American Civil Liberties Union, argued that the "cap gap" and other provisions of the law penalized speech in violation of the First Amendment rights of candidates who did not participate in the public financing program. The First Circuit properly rejected this "penalty" theory and held that the Rhode Island statute does not "impose[] any burden on first amendment rights." *Id.* at 39. The Court concluded that the provision of incentive matching funds by the government to candidates in a public financing program did not raise a cognizable First Amendment claim for those outside the system—even for those who may have been affected in an ancillary manner by the expenditure of government funds.

This holding is based on an altogether different First Amendment analysis from, and conflicts with, the decision of the Court of Appeals in this case. While the provisions of the Rhode Island and Minnesota statutes differ, both states' public financing programs raise the same conceptual issue: whether the provision of incentives to candidates who opt to participate in a public financing system infringes on any First Amendment rights of those outside the system whose own speech may not be curtailed but who may be relatively disadvantaged by

the government expenditures. In both instances, the statute offers a substantial governmental benefit to participants in the system but does not limit or penalize persons outside the voluntary program. In both cases, the statutes are content-neutral: the effect, if any, on those outside the voluntary program arises only from the grant of a government benefit to those candidates who have chosen to join the public financing system.

As in *Vote Choice*, the public defendants in this case argued that the Minnesota system does not raise a cognizable claim under the First Amendment, because it involves only the expenditure of funds by the government and creates no direct restraints on persons outside the system. Unlike the First Circuit in *Vote Choice*, the Eighth Circuit explicitly rejected this argument by holding that the indirect effects of government spending were sufficient to warrant the "strict scrutiny" test that it applied. Petition for a Writ of Certiorari at A11. In applying strict scrutiny, the Court of Appeals created a direct conflict with the constitutional analysis and holding of the First Circuit that such government spending does not implicate the First Amendment rights of those outside the campaign finance system. The two cases cannot be reconciled.

The position of the First Circuit in *Vote Choice* was correct. This Court has consistently held that a statute does not implicate First Amendment interests when the government provides content-neutral subsidies for some, but not all, speech. *See Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983) ("[w]here governmental provision of subsidies is not 'aimed at the suppression of dangerous ideas,' its 'power to encourage actions deemed to be in the public interest is necessarily far broader' ") (citations omitted). *See also Rust v. Sullivan*, 500 U.S. 173 (1991) (the government may selectively fund program to encourage some, but not all, free speech activities and is entitled to determine the limits of that program). These cases, as well as numerous

other Supreme Court decisions, make clear that the states, as well as Congress, may confer benefits on one group without raising an entitlement by others to equal benefits. *See, e.g., Maher v. Roe*, 432 U.S. 464 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Cammarano v. United States*, 358 U.S. 498 (1959).[18]

Moreover, the Minnesota independent expenditure provisions tend to enhance public debate and the free and unfettered exchange of ideas. As the District Court noted below, "[t]o the extent the statute provides for increased debate about issues of public concern raised by an independent expenditure, it promotes the free and open debate the First Amendment seeks to foster and protect." *See* Petition for a Writ of Certiorari at A39. *See also Vote Choice*, 4 F.3d at 39 ("the challenged statute furthers, rather than smothers, first amendment values").[19] The provision of additional funds to candidates who confront independent expenditures encourages candidates to opt for public financing by ensuring that they, like candi-

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[18] The Minnesota, as well as the Rhode Island, statute is distinguishable from the statutes held unconstitutional in *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 14-15 (1986), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). In those cases, the statutes at issue required private entities to finance the messages of others. By thus compelling the plaintiffs to speak for others, the statutes violated their First Amendment rights. In contrast, the statute at issue here involves public—not private—subsidies, requires nothing of the persons making independent expenditures, and merely provides a mechanism so that candidates within the system may have a means to engage in debate.

[19] Similarly, the House report on H.R. 3 noted that:

> [t]hese provisions adhere to First Amendment values by allowing for an increase in debate and increase in the voices which may be heard. We emphasize that the persons making the independent expenditures are not restricted; they may do so in unlimited amounts. Thus, these provisions enhance the ability to speak. . . .

H.R. Rep. No. 375, 103d Cong., 1st Sess. 53 (1993).

dates who eschew the system, will have the resources to engage in public debate and further public knowledge of the contested issues. The Minnesota statute thus advances core First Amendment values in the " 'widest possible dissemination of information from diverse and antagonistics sources,' " *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (citation omitted), and does not act as a restraint on the First Amendment rights of respondents.

II. THE COURT SHOULD GRANT THE PETITION TO PRESERVE FEDERAL AND STATE EFFORTS TO ENACT COMPREHENSIVE CAMPAIGN FINANCE REFORMS AND PUBLIC FINANCING PROGRAMS

The Court should grant the Petition for a Writ of Certiorari because the decision of the Court of Appeals, which applies strict scrutiny to the provisions at issue, creates significant uncertainty as to the constitutionality of comprehensive campaign finance reform legislation that has been enacted in several states.[20] In addition, the decision below casts into doubt legislation currently pending before the legislatures in a number of states, as well as bills that may be presented to the next Congress. By granting the Petition, this Court would bring badly needed clarity to an area that has experienced substantial change over the past two decades.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court broadly endorsed voluntary public financing as a constitutional means of curtailing campaign finance abuses.

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[20] In addition to the public financing programs described herein Michigan, New Jersey, Hawaii, Massachusetts, Maryland, and North Carolina have all enacted public financing programs. *See* Mich. Comp. Laws Ann. § 169.261 (West Supp. 1994); N.J. Stat. Ann. § 19:44A (West 1989 & Supp. 1994); Haw. Rev. Stat. §§ 11-217, 11-219, 11-222 (1994); Mass. Gen. Laws Ann. ch. 10, § 42 (West 1986); Md. Ann. Code art. 33, § 31 (1993); and N.C. Gen. Stat. § 163-278 (1994). Several cities and counties have also enacted public financing programs, including New York City; Long Beach, California; Los Angeles; Tucson, Arizona; Sacramento County, California; and King County, Washington.

While the Court concluded that certain expenditure limits violated the First Amendment, it upheld the public financing provisions (and the expenditure limits contained therein) of the Federal Election Campaign Act as a valid initiative to "reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91.

As part of these initiatives and in response to growing concerns about the consequences of increasing independent expenditures and spending by nonparticipating candidates on the viability and effectiveness of public financing systems, many states created flexible spending caps as core provisions of their public financing systems. Absent these reforms, a nonparticipating candidate or independent group might make massive expenditures against the participating candidate, thereby leaving him or her without adequate resources to engage in full public debate because of the spending limits imposed under the program.[21] Consequently, these provisions are crucial to ensure that public financing presents a workable alternative to private campaign contributions.

The Minnesota provisions struck down below represented that state's efforts to provide a constitutionally acceptable alternative to private campaign finance.[22] As

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[21] To be sure, not all public financing systems contain flexible cap provisions. The presidential financing system, for instance, does not contain such provisions. Of course, the Federal Election Campaign Act was enacted substantially before the recent growth in independent expenditures, *see infra* n.27, and there was thus a relatively small interest in flexible caps at the time. Moreover, there is a materially greater possibility that independent expenditures could effect the viability and effectiveness of a $600,000 public campaign financing system than a $60 million system such as the presidential system.

[22] Chapter 318 was enacted after a task force recommended legislation that would "enhance the public's confidence in the political process and in public officials" and would "encourage a broader

in other states, the Minnesota legislation provides candidates with state funds once they agree to abide by specified spending limits. As part of this comprehensive framework, in 1993, the legislature amended the statute to include independent expenditure provisions, Minn. Stat. Ann. § 10A.25(13),[23] which (a) increase a candidate's expenditure limits by the amount of independent expenditures made either to defeat the candidate or to promote the candidate's major party oponents; and (b) create a supplemental public subsidy equal to one-half the amount of such independent expenditures.[24]

The Minnesota legislature determined that these independent expenditure provisions were necessary to ensure that the public finance program remained a realistic option for candidates.[25] Independent expenditures have grown significantly in recent years, both in [26] and out [27] of Min-

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public participation in the electoral process." *See* Petition for a Writ of Certiorari at A103.

[23] The statute defines "independent expenditures" as expenditures expressly advocating the election or defeat of a clearly identified candidate, which expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent.

Minn. Stat. Ann. § 10A.01(10b) (West 1994).

[24] These provisions are triggered once an independent expenditure exceeds a $100 threshold. The Minnesota statute requires individuals, political committees, and political funds to report their intent to make an expenditure in excess of $100. Minn. Stat. Ann. § 10A.20(6B) (West 1994). After the independent expenditure has been reported, the opposed candidate receives notice of the increase in expenditures limit and becomes eligible for additional public funds. *Id.* at § 10A.25(13).

[25] *See* Petition for a Writ of Certiorari at 12-13.

[26] For instance, independent expenditures during the 1992 elections amounted to approximately $332,000, as compared to candidate spending of about $9 million. *Id.* at 13.

[27] For example, in the 1988 presidential and congressional elections, there was approximately $21.3 million in independent expendi-

nesota. The independent expenditure provisions thus further two substantial government interests: they provide appropriate incentives for candidates who may fear that the expenditure limits of the public financing system would leave them with inadequate resources to respond to issues raised through independent expenditures [28] *and* they provide adequate resources to ensure that there will be broad-based debate on matters of public concern. *See Buckley*, 424 U.S. at 47.[29]

The Minnesota statutory provision held unconstitutional is similar in operation to statutes enacted in at least five other states. Under each of these statutes, as well as in the proposed federal system for contests for the House of Representatives and the Senate, a participating candidate's expenditure limit would be increased if an opposing candidate makes expenditures in excess of that permitted under the voluntary system or if another group or individual makes independent expenditures targeted against the participating candidate or in favor of his or her opponent. Three states, as well as Minnesota, have enacted statutes that contain provisions that (a) release participating candidates from existing expenditure limits, and (b) provide participating candidates with additional public funds, when a nonparticipating opponent's spending exceeds the designated expenditure limits. *See* Ky. Rev. Stat. Ann. §§ 121A.030(5)(a), 121A.060(2)(c), 121A.080(4)(a) (Michie 1994); Fla. Stat. Ann. §§ 106.353(2), 106.355 (West 1992); Neb. Rev. Stat. § 32-1606 (1993). At

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tures, compared with only $2 million in 1976, S. Rep. No. 41, 103d Cong., 1st Sess. 23 (1993).

[28] *See id.* at 24.

[29] Although, as the Eighth Circuit observed, nearly all of the candidates in Minnesota opted for public financing in 1992, future candidates would be unlikely to view the program as a realisitc alternative to private campaign contributions if, as expected, independent expenditures continue to increase. *See* Petition for a Writ of Certiorari at 13 (noting that newly-enacted restrictions on direct contributions are likely to lead to a substantial increase in independent expenditures).

least two other states permit participating candidates to raise additional private contributions and make additional expenditures should a nonparticipating opponent's expenditures exceed the program's spending limits. *See* R.I. Gen. Laws § 17-25-24 (1993); Wis. Stat. Ann. § 11.50(2)(i) (West Supp. 1994). Like the Minnesota, Kentucky, Florida, and Nebraska statutes, the Senate and House bills have provided for increases in the campaign expenditure ceilings, as well as additional public funds, based on the amount of expenditures by nonparticipating candidates,[30] and, like Minnesota, based on the amount of independent expenditures.[31]

Not only does the Eighth Circuit's decision threaten to invalidate other independent expenditure provisions, it

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[30] *See* S. 3, 103d Cong., 1st Sess. § 101(a) (1993); H.R. 3, 103d Cong., 1st Sess. § 121(a) (1993).

[31] At the federal level, both houses of Congress determined that such provisions would help ensure that a public financing program remains a realistic alternative for prospective candidates without unconstitutionally restricting the ability of individuals to make independent expenditures. *See* H.R. Rep. No. 375, 103d Cong., 1st Sess. 53 (1993); S. Rep. No. 41, 103d Cong., 1st Sess. 24-25 (1993).

Section 302 of H.R. 3 required that any individual making an independent expenditure of more than $5,000 at least 20 days before the election, or more than $1,000 within 20 days of the election but not later than 24 hours before the election, file a report disclosing the expenditure. Under section 121(a) of H.R. 3, once independent expenditures exceeded $10,000 from all sources, participating candidates would have been permitted to exceed their spending limits and would have been entitled to matching funds.

Similarly, section 133 of S. 3 required that any individual making an independent expenditure of more than $10,000 no later than 24 hours before the election file a report. Under section 101 of S. 3, participating candidates would have been permitted to exceed the spending limits and would have received a subsidy equal to the amount of the independent expenditure for those expenditures that exceeded $10,000 from a single spender.

H.R. 3 and S. 3 were each adopted by their respective houses of Congress. The motion to submit S. 3 to a House-Senate conference, however, was defeated by a filibuster. We expect that both houses of Congress will consider similar legislation in the future.

raises doubts about those statutory provisions that increase public funding for candidates who have chosen that route when candidates who do not opt for public financing spend funds in excess of the participant's limit. These provisions implicate comparable policies as the Minnesota statute, raise comparable legal issues, and are comparably cast into doubt by the decision of the Eighth Circuit.

As a group, these provisions are integral to public financing programs—and the acceptance of voluntary spending limits—as a realistic alternative to private campaign finance. Without such carefully balanced measures, candidates who would otherwise seek to diminish the burdens and entanglements of private fundraising will be unlikely to participate in public financing programs. Moreover, the decision raises doubts as to whether the states may impose a financially sustainable system with sufficient flexibility to ensure that candidates within the system will have adequate resources to engage others in the public debate that is at the core of democratic politics. As a result, First Amendment values will suffer.

CONCLUSION

For the reasons set forth above, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 94-983

In The

Supreme Court of the United States

October Term, 1994

JOHN L. HOLAHAN, JR., in his official capacity as Chair of the Minnesota Ethical Practices Board; HUBERT H. HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,

Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA; et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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Petitioners submit this brief in reply to Respondents' briefs in opposition to Petitioners' petition for a writ of certiorari.

I. THE COURT MAY GRANT CERTIORARI BECAUSE OF A CONFLICT IN PRINCIPLE BETWEEN THE DECISION OF THE COURT BELOW AND DECISIONS OF THIS COURT OR OTHER COURTS AND SHOULD DO SO HERE.

Respondent Schwietz erroneously argues that a conflict in principle between a circuit court decision and a decision of this Court or another court is not a sufficient basis upon which this Court can grant a petition for a writ of certiorari. Brief at 11. In fact, this Court has granted certiorari in cases based upon exactly such conflicts in principle. *See, e.g., Oregon Department of Fish and Wildlife v. Klamath Tribe,* 473 U.S. 733, 764 (1985) ("appeared to conflict in principle"); *Ivan Allen Co. v. United States,* 422 U.S. 617, 623-24 (1975) (certiorari granted based on claimed "conflict in principle"). As explained in Petitioners' petition, *id.* at 17-30, there is such a conflict in principle between the Eighth Circuit's decision and decisions of this Court and other circuit courts concerning a very important issue of First Amendment law that warrants this Court's review of this case.

II. RESPONDENTS' ARGUMENTS THAT THE INDEPENDENT EXPENDITURE PROVISIONS ARE INFIRM FOR REASONS OTHER THAN THOSE EXPRESSED BY THE EIGHTH CIRCUIT ARE WITHOUT MERIT AND PROVIDE NO BASIS TO DENY THE PETITION.

Respondents argue that the Court should deny the petition in this case because the independent expenditure provisions are fatally defective for reasons besides these expressed by the Eighth Circuit. Specifically, they claim that the provisions deny political candidates equal protection, that the reporting obligations are unconstitutionally vague, and that the subsidy provisions cannot operate in a manner that will

achieve the legislature's intended purpose. As discussed below, each of these arguments is without merit and does not justify the denial of the petition.

A. Minnesota's Independent Expenditure Provisions Do Not Deny Political Candidates Equal Protection Of The Laws.

Respondents Unruh and Erickson contend that Minnesota's independent expenditure provisions "suppress" their speech and thereby deny them equal protection of the laws. Brief at 24-25. Respondents' argument is altogether incorrect for several reasons.

First, the independent expenditure provisions apply exactly the same to all political candidates including Respondents and their political opponents. Respondents state that, under the statutory scheme, independent expenditures made in support of them or in opposition to their opponents trigger an increase in their opponents' expenditure limits and a public subsidy to their opponents. While that is true, it is also true that independent expenditures made in favor of their opponents or in opposition to Respondents trigger an increase in Respondents' limits and a subsidy to Respondents assuming that they have opted to participate in the State public financing scheme. Suffice it to say, the statute does not discriminate between any candidates and, therefore, presents no equal protection problem.

Second, Respondents apparently contend that the Court should look at the following two classes of candidates for purposes of their equal protection argument: (1) those who either benefit from an independent expenditure or whose opponents are the targets of an adverse expenditure; and (2) those who are the targets of an adverse independent expenditure or whose opponents benefit from such an expenditure. There is also no equal protection problem even under this analysis because these two classes of candidates are not similarly situated. One class benefits from the independent expenditure while the other suffers as a result of it. Accordingly, the fact that the statute treats these classes differently is

entirely rational and appropriate. While the former certainly neither needs nor deserves any subsidy or expenditure limit increase as a result of a favorable independent expenditure, the latter may very well need these benefits to be able to effectively respond to adverse independent expenditures, especially when made close in time to the election.

Respondents also mislead the Court in their repeated references to the statute's "suppression" of the expenditure limits of candidates in whose favor independent expenditures are made. The statute has absolutely no effect on the expenditure limits of such candidates. Nor should it insofar as these candidates have no need for an increase in their expenditure limits when independent expenditures are made in their favor.[1] Accordingly, the statute does not, as Respondents

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[1] Likewise, there is also no problem with the "fairness doctrine," which this Court upheld in *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), because the doctrine requires broadcasters to provide the opportunity to reply to personal attacks to the individuals who are the targets of the attacks. One would not expect, nor does the doctrine require, that a broadcaster also provide an opportunity for someone to speak who was not only not the target of such an attack, but, in fact, benefited from it.

Respondents unsuccessfully try to distinguish *Red Lion Broadcasting* in regard to their First Amendment argument by claiming that the independent expenditure provisions do more than simply provide candidates with an opportunity to respond. They claim that the statute penalizes citizens for engaging in protected political speech. Brief at 16. As discussed above, and in Petitioners' petition, the statute does not penalize the candidates or those making the expenditures. Under Respondents' line of reasoning, the fairness doctrine would also violate the First Amendment because it also "chills" the protected speech rights of those wishing to make personal attacks by providing someone who has been the target of such an attack with an opportunity to respond just like the independent expenditure provisions do. Just as the fairness doctrine is not in violation of the First Amendment based on such an alleged chilling effect, neither are Minnesota's independent expenditure provisions.

suggest, restrain or otherwise decrease the expenditure limits of such candidates.

B. The Independent Expenditure Reporting Provisions Are Not Unconstitutionally Vague.

Respondent Schwietz argues that the independent expenditure reporting provisions are unconstitutionally vague because candidates cannot determine when they have become obligated to make an independent expenditure. Brief at 23-24. The Eighth Circuit did not address this issue. A14-15. The district court, however, did address precisely this argument and correctly rejected it. A40-47. As the court indicated, the proper analysis is whether the statutory language is sufficiently definite to allow ordinary citizens to understand what is required of them and to discourage arbitrary and discriminatory enforcement. A42 (citing *Kolander v. Lawson*, 461 U.S. 352, 357 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). As discussed below, the district court correctly applied this standard in concluding that Respondent's vagueness challenge must fail.

The district court initially observed that the existence of a legal obligation to make an independent expenditure is readily determined by common experience and well-established contract law and equitable principles and does not require speculation or more sophistication than that of an ordinary consumer. A42-43. Moreover, the court properly noted that political funds and committees, like several of the Respondents in this case, have a higher degree of sophistication in matters of political expenditures than ordinary persons such that their contention that they are unable to determine when they have become obligated to make an independent expenditure lacks credibility. A43.

Finally, the district court properly stated that the availability of an advisory opinion from the State Ethical Practices Board avoids any vagueness problem with the statute. A45-46. As the court stated, this Court has suggested that such an advisory opinion mechanism alleviates any vagueness problems. *Buckley v. Valeo*, 424 U.S. 1, 40 n.47 (1986). In

fact, this Court affirmed a previous decision of the district court stating that precisely this same advisory opinion mechanism sufficiently alleviated any vagueness problem with a different provision of Chapter 10A of the Minnesota Statutes. *See Bang v. Chase*, 442 F. Supp. 758, 769-70 n.33 (D. Minn. 1977), *aff'd*, 436 U.S. 941 (1978). In the final analysis, the law does not require anyone to guess at its meaning or expose anyone to risk of penalty without fair warning and is, therefore, not void for vagueness. A45.

C. The Independent Expenditure Public Subsidy Provision Does Operate In A Manner That Serves Its Intended Purpose.

Respondent Schwietz argues that the Court should not review this case because the independent expenditure provisions cannot be implemented to achieve their intended result. Brief at 21. Respondent's argument is based on the erroneous belief that the statutory scheme does not permit the payment of an independent expenditure subsidy until the general election is over. *Id.* at 22. Respondent mistakenly contends that the public subsidy under the independent expenditure provisions is paid from the statutory general account and that candidates are not eligible to receive subsidies from this account until after they have obtained a certain percentage of the vote in the election. Respondent, therefore, contends that since no pre-election subsidy can be paid, the legislature's desire to give a subsidy to candidates to respond to independent expenditures cannot be met.[2]

The flaw in Respondent's analysis is that the public subsidies paid as a result of independent expenditures under Minn. Stat. § 10A.25, subd. 13(c) are paid out of a separate appropriation from the State general fund and not the statutory "general account" referenced in chapter 10A. *Id.* The eligibility requirements for subsidy payments from this account are, therefore, not applicable to the public subsidies paid as a result of independent expenditures. Section 10A.25,

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[2] The Eighth Circuit also discussed this issue in its decision. A7-8 n.2.

subd. 13(c), expressly authorizes the payment of an independent expenditure subsidy if a candidate is entitled to receive "a" public subsidy. Because a candidate who has won the primary election is entitled to "a" public subsidy from the political party account, Minn. Stat. § 10A.31, subd. 6, such a candidate qualifies for an immediate independent expenditure subsidy and need not, as Respondent argues, await the results of the general election. Because there is no prohibition on the payment of these subsidies prior to the election, and at a time when the candidates can use the money to combat adverse independent expenditures, the statutory scheme operates precisely as intended, and Respondent's argument cannot stand.

III. THE MINNESOTA LEGISLATURE COULD REASONABLY HAVE ASSUMED THAT ITS DRAMATIC REDUCTION IN THE CONTRIBUTION LIMITS APPLICABLE TO CANDIDATES WOULD LIKELY RESULT IN A CORRESPONDING INCREASE IN INDEPENDENT EXPENDITURES AND RISK TO THE STATE PUBLIC FINANCING SCHEME.

Respondents assail the State's justification for Minnesota's independent expenditure provisions as irrational. As explained in Petitioners' petition, the Minnesota Legislature could reasonably have assumed that its dramatic reduction in the contribution limits applicable to candidates would likely result in a corresponding increase in independent expenditures and a corresponding increase in the risk that such adverse expenditures pose to candidates agreeing to participate in the public financing scheme. As Amici Common Cause and Common Cause of Minnesota noted in their brief, independent expenditures in federal campaigns jumped up by over 1110 percent in the eight years after the inception of federal regulation of contribution levels. *Id.* at 5.[3] Certainly,

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[3] Several commentators have also noted that there was a similar dramatic increase in the number of political action committees in direct

the legislature's decision to counterbalance that risk to preserve the viability of the State's voluntary spending limit program was not unreasonable.

The Eighth Circuit erroneously decided that the independent expenditure provisions were not necessary because of the historically high participation rate in Minnesota's public financing scheme. The court completely failed to recognize, or even acknowledge, the likely effect of the recent contribution limit reductions on future independent expenditure levels and the threat such expenditures will likely pose to a public financing system that incorporates voluntary spending limits. One commentator elaborated on the same reasoning which prompted the United States Senate and House of Representatives to pass bills containing very similar independent expenditure provisions:

> In essence, the congressional judgment is that the proposed statutory scheme combining public funding with spending limits is unworkable without matching funds for participating candidates to respond to independent expenditures. In view of the Court's approval of the concept that public funding can be conditioned on compliance with spending limits, it is unlikely that the Court would reject Congress's judgment that the matching funds provisions are indispensable to the statutory scheme. The post-*Buckley* experience concerning the potential and actual impact of independent expenditures should afford the Court an adequate basis on which to sustain the matching funds provisions.

Stein, *supra*, at 783. These comments are equally applicable in this case.

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response to the federal limits on individual contributions. *See* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 Colum. L. Rev. 1390, 1403 (1994); Gary S. Stein, *The First Amendment and Campaign Finance Reform: A Timely Reconciliation*, 44 Rutgers L. Rev. 743, 758 (1992).

Respondents also mistakenly rely on certain statements by Senator John Marty in claiming that the legislature's motive in enacting the independent expenditure provisions was impermissible. The threshold problem with Respondents' argument is that the law is well-established that, except for a few limited and well-defined exceptions, legislative motives are irrelevant in determining the constitutionality of a statute. As this Court made clear in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986):

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . .
>
> . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Id. at 48 (ellipsis in original) (quoting *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968)). The exceptions to this rule do not include cases involving content-neutral statutes which do not directly inhibit freedom of speech or some other expressive activity or enterprise. *South Carolina Education Association v. Campbell*, 883 F.2d 1251, 1259 (4th Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990).

Moreover, even if the intent of the legislature were relevant to the statute's constitutionality, the statements of a single senator scarcely suffice to establish the legislature's intent. As the district court aptly noted, the statements of a single senator at a hearing before a committee of a single body of a bicameral legislature are insufficient to demonstrate the collective intent of the entire legislature in subsequently enacting the final version of the bill. A26 n.2.

In addition, Respondents Day, et al., mistakenly and inaccurately cite several cases of the Minnesota Supreme Court and this Court for the proposition that "the only comments that are relevant and afforded weight in evincing legislative intent are the comments of the author of the bill." Brief at 8. First, all of the cases Respondents cite deal with a

court's resort to the legislative history to construe the meaning of ambiguous statutory provisions. In this case, no one is claiming that the Court need look at the legislative history of the independent expenditure provisions to construe their meaning. The provisions are absolutely unambiguous. In fact, Respondents have not cited this very selected legislative history to argue how the independent expenditure provision should be interpreted. Rather, they have cited it for the purpose of impugning the motivation of the legislature in enacting the law, which, as discussed above, is ultimately irrelevant to the question of the statute's constitutionality.

Second, these cases do not, in fact, state what Respondents allege. The Minnesota Supreme Court only stated in these cases that the statements of the sponsor of a bill or amendment are "generally entitled to some weight." *Handle With Care, Inc. v. Department of Human Services*, 406 N.W.2d 518, 522 (Minn. 1987); *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 263 (Minn. 1989). The court did not state that the sponsor's statements are the only relevant statements in evincing the legislature's intent. And, in fact, the court looked beyond the sponsor's statements in construing the legislative intent in the very cases Respondents cite. *Id.* Similarly, this Court remarked that the statements of one of the legislation's sponsors deserves substantial weight in interpreting a statute. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 448, 564 (1976). The Court did not state, and has never held, that this is the exclusive source of information bearing on the legislative intent of a law.

Finally, even if the intent of Senator Marty were relevant and the Court were to assume that he spoke for the whole legislature, his comments were, as the district court in this case observed, insufficient to show that the legislature acted with the intent of suppressing Respondents' First Amendment rights. A27 n.2 (*citing Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (to invalidate on equal protection grounds, a facially neutral legislative scheme, plaintiff must show that state legislature selected a particular course of action, at least in part, because of its adverse effects on an identifiable group)). After reviewing the

entire record, including the text of the legislation, the available legislative history, the background information and documents, and the representations and arguments of the State executive branch, the district court properly determined that the apparent intent of the legislature in enacting the 1993 amendments governing political campaigns and campaign financing, including the independent expenditure provisions, was to reduce the potential for corruption and the appearance of corruption in the political process. A27 n.2. This is precisely the type of governmental interest that would justify an infringement on otherwise protected speech as this Court recognized in *Buckley,* 424 U.S. at 25-26.

CONCLUSION

For the reasons stated above, and in Petitioners' petition, the petition for a writ of certiorari should be granted.

Dated: January 16, 1995

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